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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INNKEEPERS OF NEW CASTLE, INC.,
Petitioner.

vs.

ROBERT J. MALEY, ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEVEN H. ANCEL
ANCEL, DUNLAP & TRAYLOR
1770 Market Square Center
Indianapolis, Indiana 46204
(317) 634-9052
Counsel for Petitioner

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Bankruptcy Court has the exclusive jurisdiction to supervise hiring of attorneys and the allowance of attorney fees in Chapter XI proceedings, 11 U.S.C. §§701-799 (1976)?[1]

2. Whether the Bankruptcy Court's authority to decide controversies regarding attorney fees is among the Article I powers of the Bankruptcy Court falling within the "summary jurisdiction" affirmed by the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, Nos. 81-150 & 81-546, slip op. (U.S. June 28, 1982)?

3. Whether choses in action of the debtor become assets of the estate upon the filing of a petition initiating a proceeding under the Bankruptcy Act?

4. Whether an order authorizing a debtor to proceed with State Court litigation subjects the whole of the litigation including the settlement and liquidation of an attorney's lien to the jurisdiction of a state court?

5. Whether federal bankruptcy law must be applied to the analysis of an attorney fee lien arising under state law?

6. Whether attorney fee contracts are entitled to the treatment generally afforded executory contracts

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[1]This case was commenced under the Bankruptcy Act of 1898 as amended [hereinafter cited as *Bankruptcy Act*]. Therefore, unless otherwise specifically stated, all citations are to the Bankruptcy Act and the United States Code provisions which parallel the Bankruptcy Act. *See Bankruptcy Reform Act of 1978*, Pub. L. No. 95-598 §403(a), 92 Stat. 2683 (1978). The Bankruptcy Act and parallel United States Code provisions have been repealed. *See Bankruptcy Reform Act of 1978*, Pub. L. No. 95-598 §401(a), 92 Stat. 2683 (1978). The Bankruptcy Rules cited were promulgated by the Supreme Court in 1973 pursuant to 28 U.S.C. 2075 (1976) (current version at 28 U.S.C. §2075 (Supp. IV 1980)) and continue in effect under the Bankruptcy Reform Act of 1978 to the extent the rules are not inconsistent with the Bankruptcy Reform Act of 1978. *See Bankruptcy Reform Act of 1978*, Pub. L. No. 95-598 §405(d), 92 Stat. 2683 (1978).

pursuant to Section 313 of the Bankruptcy Act, 11 U.S.C. §713 (1976)?

7. Whether the Bankruptcy Court possesses the jurisdiction to determine the extent, validity and priority of liens asserted against assets of the estate?

8. Whether the decision of the Court of Appeals is an erroneous substantial erosion of statutory and legal principle when it finds: (1) that a pre-filing attorney fee agreement is entitled to executory contract treatment pursuant to Section 313 of the Bankruptcy Act, 11 U.S.C. §713 (1976) and is not subject to review by the Bankruptcy Court under Bankruptcy Rules 215, 219 and 220; (2) that a cause of action owned by the debtor on the commencement of the bankruptcy proceeding is not an asset of the bankruptcy estate; (3) that notwithstanding Indiana statutory and legal principle, the filing of a notice of intention to assert a lien pursuant to Indiana Code §33-1-3-1 (1976) was conclusive in establishing lien validity and amount; (4) that where a valid attorney's lien is asserted for services rendered with respect to an asset of the estate, the Bankruptcy Court's right to review fees under Bankruptcy Rules 219 and 220 does not apply; and (5) that an order of the Bankruptcy Court authorizing the continuation of condemnation litigation by the debtor was a waiver of Bankruptcy Court jurisdiction and subjected the whole of the litigation including the settlement and liquidation of an attorney's lien charge to the jurisdiction of the state court?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Innkeepers of New Castle, Inc. prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 10, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the

Seventh Circuit is reported at 671 F.2d 221 (7th Cir. 1982) and is set out in the Appendix at A-1. The order denying the petition for rehearing is unpublished but appears in the Appendix at A-55. The opinion and order for payment of attorneys' fees and allowances of the District Court for the Southern District of Indiana is unpublished but appears in the Appendix at A-24. The recommendations of Bankruptcy Judge on application for allowances is unpublished but appears in the Appendix at A-26.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 10, 1982. A timely petition for rehearing *en banc* was denied on March 10, 1982, and an application for extension of time in which to file petition for writ of certiorari was filed on May 28, 1982 with this Court. On May 28, 1982, this Court entered its order extending the time to file petition for writ of certiorari to and including August 7, 1982. This Court's jurisdiction is invoked under Section 24 of the Bankruptcy Act, 11 U.S.C. §47 (1976) and 28 U.S.C. §1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND BANKRUPTCY RULES INVOLVED

This cases involves the United States Constitution, Article I, Section 8, clause 4 and the United States Constitution, Article III, which are set forth in the Appendix, A-56 to A-59.

The statutes involved in this case are the Bankruptcy Act of 1898, §§24a, 24c, 62d, 67c(1)(B), 70a(5), 70a(6), 70b, 306(4), 311, 313(1), 342, 357(2), and the parallel provisions of the United States Code of 1976, which are 11 U.S.C. §47(a), 11 U.S.C. §47(c), 11 U.S.C. §102(d), 11 U.S.C. §107(c)(1)(B), 11 U.S.C. §110(a)(5), 11 U.S.C. §110(a)(6), 11 U.S.C. §110(b), 11 U.S.C. §706(4), 11 U.S.C. §711, 11 U.S.C. §713(1), 11 U.S.C. §742, 11 U.S.C. §757(2), 28 U.S.C. §311

(1976), 28 U.S.C. §1254(1) (1976), 28 U.S.C. §2075 (1976);[2] and Indiana Code §33-1-3-1 (1976) all of which are set forth in the Appendix, A-59 to A-68.

The Rules of Bankruptcy Procedure involved in this case are Bankruptcy Rules 215, 219, 220, 10-206, 10-215, 10-217, 11-11, 11-22, 11-31 and 11-32, all of which are set forth in the Appendix, A-69 to A-80.

STATEMENT OF THE CASE

This matter originated with the filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act pursuant to 11 U.S.C. §§701-799 (1976)[3] by the debtor, Innkeepers of New Castle, Inc. The District Court's jurisdiction over the cause exists pursuant to Section 311 of the Bankruptcy Act, 11 U.S.C. §711 (1976). A final "Order of Court for Payment of Attorneys' Fees and Allowances" was entered by the District Court on December 11, 1980. Appeals taken from that order to the Court of Appeals for the Seventh Circuit were pursuant to Section 24a of the Bankruptcy Act, 11 U.S.C. §47(a) (1976).

On November 17, 1976, Innkeepers filed its "Original Petition under Chapter XI" commencing the proceedings. On the same date, Innkeepers filed its "Application to Employ Counsel"[4] wherein the debtor sought to retain Robert Maley and the law firm of Bamberger & Feibleman to, among other matters, "perform all other legal services for debtor as debtor-in-possession which may be necessary to protect debtor's interests and successfully obtain the object of debtor's Chapter XI proceedings."[5] Pursuant to said application, on the same date, the Bankruptcy Court entered its order authorizing the appointment of Robert

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[2] *See supra* note 1.
[3] *See supra* note 1.
[4] Record, Vol. 1 at 89.
[5] Record, Vol. 1 at 90.

Maley and the firm of Bamberger & Feibleman as attorneys on general retainer.[6]

On December 6, 1976, Innkeepers filed its application to go forward with a certain condemnation action entitled *State of Indiana v. Innkeepers of New Castle, Inc.*, then pending in the Fayette County, Indiana, Circuit Court. Said application alleged that "funds generated from said lawsuit form the basis for a portion of the plan of arrangement to be proposed herein."[7] On the same day, the Bankruptcy Court entered an order authorizing the same.

On December 8, 1976, following a jury trial, a judgment in favor of Innkeepers in the amount of $1,135,254.79 was entered in the condemnation action. On the same day, without notice to the Bankruptcy Court, pursuant to Indiana Code §33-1-3-1 (1976), Robert J. Maley and local counsel, Jim C. Cordes, entered in writing upon the judgment docket in Fayette County, Indiana notice of their intention to hold a lien on proceeds of the judgment for the amount of their attorneys fees claim which they alleged to be the sums of $567,637.00 and $100,000.00, respectively. Robert Maley's claim for the sum of $567,637.00 was based upon an oral contingent fee contract of employment between his firm and Innkeepers entered into in April 1971 and memorialized in writing on January 5, 1976 whereby Maley's firm was entitled to fifty percent of any recovery subject to minor adjustments. Jim Cordes's claim was based upon services rendered.

The existence of the contingent fee contract of Maley and the employment of Cordes was never disclosed to the Bankruptcy Court until the filing of their applications for allowances with the Bankruptcy Court in 1979. The only reference with respect to Innkeepers's pre-filing obligation

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[6]Record, Vol. 1 at 91.

[7]Record, Vol. 1 at 93.

to Maley for fees is contained in the Innkeepers's statement of affairs which was filed in the proceeding on December 21, 1976 after the condemnation judgment was entered and the attorneys lien was asserted and which states "Fees for legal services in 1976—bill not rendered (State of Indiana v. Innkeepers of New Castle, Inc.—50% of amount recovered over costs.)"[8] Neither the contingent fee contract of Maley nor Mr. Cordes's employment agreement were disclosed in the Statement of Executory Contracts filed by the debtor pursuant to Bankruptcy Rule 11-11 on December 31, 1976.[9] Neither Mr. Maley nor Mr. Cordes disclosed the existence of the employment contracts by affidavit as required by Bankruptcy Rule 219.

By entry dated March 28, 1977, the Bankruptcy Court determined that mortgage lenders Alexander Hamilton Life Insurance Company of America and Citizens State Bank of New Castle, Indiana possessed valid and enforceable liens upon the condemnation judgment proceeds to the same extent and amount and with the same relative priority as their mortgages constitute valid and enforceable liens.[10] By order dated November 7, 1979, the Bankruptcy Court directed that the condemnation judgment proceeds be invested by Innkeepers and that the liens of the mortgage lenders and the "asserted liens" of Robert Maley and James C. Cordes attach to proceeds to the same extent as if those funds remained in the possession of the Clerk of the Fayette County Circuit Court. That order further provides that "the extent, validity and priority of all liens asserted against proceeds shall be determined by this Court after notice and actual hearing."[11]

On November 15, 1979, the Bankruptcy Court ordered the attorneys asserting liens on the condemnation

[8]Record, Vol. 1 at 57.
[9]Record, Vol. 1 at 81-84.
[10]Record, Vol. 1 at 99.
[11]Record, Vol. 1 at 111.

judgment to file their applications for attorneys fees in connection with the judgment.[12] Cordes filed his application for payment of attorney fees on November 30, 1979.[13] On December 7, 1979, Maley filed his application for attorney fees wherein he moved "the Court to order the debtor-in-possession to pay the attorney fees due him for his services as attorney for debtor-in-possession...."[14] Objections to the applications were filed on December 13, 1979, by Alexander Hamilton and Citizens State Bank of New Castle, Indiana.

Pursuant to notice, a hearing was held and on July 24, 1980 the Bankruptcy Judge entered his "Recommendations of Bankruptcy Judge on Applications for Allowances," wherein the Bankruptcy Judge held, *inter alia*, that the Bankruptcy Court has paramount and exclusive jurisdiction to determine attorney fee allowances and exclusive jurisdiction over all property of the estate including the proceeds of the condemnation judgment; that Maley and Cordes failed to comply with Section 62d of the Bankruptcy Act, 11 U.S.C. §102(d) (1976) and Bankruptcy Rule 219(b) covering disclosure of compensation paid and promised and division of compensation; that the Bankruptcy Court is not bound by the contingent fee agreement, but is obligated to make reasonable allowances of attorney fees taking into consideration such factors as economy, benefit to creditors, efficiency, the size of the estate and the proportionate amount thereof recovered through the efforts of the attorney, the time expended by the attorney, attorney's ability and experience, difficulty and intricacy of the legal propositions determined, evidence in the record of the reasonableness of the fee and the total cost incurred in the administration of the estate as related to the size thereof. The Court further found that the

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[12]Record, Vol. 1 at 115.
[13]Record, Vol. 1 at 118.
[14]Record, Vol. 1 at 190.

Bankruptcy Court had the jurisdiction to determine validity of the attorneys lien, although there was no need to do so in the instant cause since attorney fees allowed would be administration expenses and would have a first priority against funds of the estate.[15]

With respect to the allowance of fees for Jim C. Cordes, the Bankruptcy Judge found that employment of Cordes had never been approved by the Bankruptcy Court; that Cordes had been retained by Maley and that because the Court did not make any arrangement for local counsel it was not obligated to calculate a separate award. Further, because there was no itemization of services upon which to make a calculation for Cordes, the Bankruptcy Judge determined that Cordes and Maley should decide among themselves how the fee should be split. The Court then recommended that a "fair and reasonable" allowance to Maley and Cordes was the sum of $325,000.00.[16]

On December 11, 1980, the District Court for the Southern District of Indiana adopted the recommendations of the Bankruptcy Judge, followed the principle set out in *Massachusetts Life Insurance Company v. Brock*, 405 F.2d 429, 432-433 (5th Cir. 1968) wherein the Court said:

> The public interest which is inherent in bankruptcy matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable...[and]...fairly compensated...while at the same time doing equity to the debtor and creditors.

and allowed Maley and Cordes a combined fee of $325,000.00.[17]

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[15]The Bankruptcy Court's Recommendations for Allowances appears in the Appendix, A-26.

[16]*See supra* note 15.

[17]The decision of the District Court appears in the Appendix, A-24.

On appeal, the order of the District Court was affirmed by the Court of Appeals insofar as it awarded Maley recovery of expenses and repaid witness fees advanced, and reversed insofar as the District Court's order fixed Maley's fee in the amount of $325,000.00 to be shared with Cordes. In addition, the cause was remanded to the District Court with instructions to hold an evidentiary hearing to determine the net recovery due Innkeepers from the condemnation proceedings and to award to Maley fifty percent of the net recovery pursuant to his perfected attorney's lien and his contingent fee contract together with fifty percent of the post-condemnation judgment interest earned by Innkeepers. Further, the District Court was instructed to compute the proper amount in settlement and discharge of Cordes's lien on a *quantum meruit* basis and was instructed to set aside that sum together with his pro rata share of the post-condemnation judgment interest earned by Innkeepers. The balance of the net recovery and interest was to be set aside to the estate.[18]

The Court of Appeals decision was based upon the following grounds:

1. That the contingent fee contract was an executory contract "which was not rejected by the debtor, any creditor or the Court, *sua sponte*," and is therefore binding upon the Court and the parties.

2. That Maley only represented the "debtor" as opposed to the "debtor-in-possession" and that pursuant to the Bankruptcy Court's order of December 6, 1976, Maley pursued the condemnation action to its completion only on behalf of the "debtor" and not the "debtor-in-possession," therefore the asset was retained by the "debtor" and managed apart from the bankruptcy estate. Consequently, the validity of his contingent fee contract and the validity and amount of Maley's attorneys lien could not be questioned by the Bankruptcy Court.

[18]The opinion of the Court of Appeals appears in the Appendix A-1.

3. That the Bankruptcy Court's order of November 28, 1977 sequestering the proceeds of the condemnation proceedings deprived the state court of its prerogative to determine the validity of the attorneys lien.

4. That the filing of notice of intention to assert a lien pursuant to Indiana Code 33-1-3-1 (1976) was conclusive in establishing that Maley's attorneys lien was a valid lien in the amount called for by his contingent fee contract.

5. That Bankruptcy Rules 219 and 220 are not applicable because the estate's chose in action was encumbered by a valid attorneys lien which could not be questioned in the bankruptcy proceeding.

6. That the order of December 6, 1976 subjected the whole of the condemnation litigation including the settlement and liquidation of the attorneys lien charge to the jurisdiction of the state court because by that order the Bankruptcy Court relinquished "summary jurisdiction" and that, therefore, the Bankruptcy Court could not consider the validity or amount of the attorneys lien.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decision conflicts with the mandate of Bankruptcy Rules 215 and 219 as promulgated by the Supreme Court and with the principle of Supreme Court holdings as to the jurisdiction and power of the Bankruptcy Court to supervise the hiring of attorneys and the allowance of attorneys fees.

The Supreme Court of the United States has the power to prescribe rules for carrying out the provisions of the Bankruptcy Act.[19] 28 U.S.C. §2075 (1976). Among the rules so promulgated is Bankruptcy Rule 11-22 which makes Bankruptcy Rule 215 applicable in Chapter XI cases to the employment of attorneys for the debtor-in-possession.

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[19] *See supra* note 1.

Bankruptcy Rule 215 provides that no attorney for a debtor-in-possession "shall be employed except upon order of the Court."

Bankruptcy Rule 11-31 makes Bankruptcy Rule 219 applicable in Chapter XI cases. Bankruptcy Rule 219(a) states in part:

> *Application for Compensation or Reimbursement.* A person seeking compensation for services or reimbursement of necessary expenses...shall file with the court an application....

Bankruptcy Rule 219(b) states in part:

> *Disclosure of Compensation Paid or Promised to Attorney for Bankrupt.* Every attorney for a bankrupt, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors...a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, [and] the source of the compensation so paid or promised....

Bankruptcy Rule 219(c) states in pertinent part:

> *General.* The compensation allowable by the court to [an]...attorney...for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of services rendered as well as to the conservation of the estate and the interests of creditors....

The language of those rules is unequivocal and unambiguous. Their effect is pervasive: (1) *No* attorney for the debtor may be employed without court approval, (2) *all* agreements for compensation must be disclosed to the Court, (3) *a person* seeking compensation *must* file with the Court an application for fees, and (4) compensation allowable by the Court *must be reasonable.*

Rules 215 and 219, with others, represent the cumulative experience of Congress and the federal courts over a period of nearly one hundred years wherein the regulation of costs and fees in bankruptcy proceedings has been a matter of continuing concern. By these rules, the Bankruptcy Court has been granted the unquestioned authority and absolute obligation to review and make allowances of all attorney fee claims in an estate arising from the bankruptcy proceedings. That view is consistent with Section 62d of the Bankruptcy Act, which Rule 219 replaces, and decisions of this Court which have uniformly upheld the jurisdiction and power of the Bankruptcy Court to review and allow attorney fee claims. *Katchen v. Landy*, 382 U.S. 323 (1966); *Leiman v. Guttman*, 336 U.S. 1 (1948); *Brown v. Gerdes*, 321 U.S. 178 (1944); *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933); *Watkins v. Sedberry*, 261 U.S. 571 (1923); *In re Wood & Henderson*, 210 U.S. 246 (1908).

The Advisory Committee on Bankruptcy Rules, established pursuant to 28 U.S.C. §331 (1976), discussed the duties and responsibilities of the Bankruptcy Court with regard to the granting of compensation in its notes to Rule 219. The Committee stated:

> The premise for including in these rules provisions governing the allowance of compensation to officers, attorneys, and accountants is that it is peculiarly a judicial responsibility to supervise the administration of estates and in particular to assure that allowances for compensation to those rendering services in connection therewith are fair but not excessive. 3A Collier ¶62.05[3] (1961). The costs of bankruptcy administration have been a matter of continuing concern in the history of American bankruptcy law. Id. ¶62.02. This concern has led to an increasing recognition of the necessity for close judicial control of these costs.

Advisory Committee Note on Bankruptcy Rules 219, reprinted in 12 COLLIER ON BANKRUPTCY ¶219.01 at 2-206 (14th ed. 1978).

As stated by the Court in *Carter v. Wood*, 433 F.Supp. 291 (W.D. Mo. 1977), at 294 in discussing the Advisory Committee's Note to 219:

> These concerns, together with the general policy in the Bankruptcy area against any "transfer of judicial power over expenditure and allowances from the court to persons who, at best, have a distinctly lesser degree of public responsibilities," 3A Collier ¶62.37, p. 1637 (1961), make clear that the law does not permit a Bankruptcy Court to contract away its obligation, under the law, to grant only reasonable compensation to attorneys for their services rendered in the administration of a bankrupt estate.

The Court of Appeals in the instant case has totally ignored the existence of Bankruptcy Rule 215 and found that Bankruptcy Rule 219 was not applicable because of a variety of distinguishing factors all arising as the result of the existence of the pre-petition contingent fee contract. The mandate of the applicable bankruptcy rules makes such differentiation inappropriate. At best, the contract could only be evidence of what a reasonable fee could be, it could never be determinative since Bankruptcy Rule 219 imposes upon the Court the duty to assure that no other than a reasonable fee be paid to attorneys in bankruptcy proceedings irrespective of the contractual basis of the fee requested. *Carter v. Wood*, 433 F.Supp. 291 (W.D. Mo. 1977).

None of the legal principles addressed have been affected by the Bankruptcy Reform Act of 1978 and the issue remains relevant under current law. No court should be allowed to ignore rules promulgated by the Supreme Court. It is imperative to the economical and orderly administration of Chapter XI estates that this Court reaffirm, in light of its Bankruptcy Rules 215 and 219, the exclusive jurisdiction and power of the Bankruptcy Court to supervise the hiring of attorneys and the allowance of attorneys fees in Chapter XI proceedings.

2. The Bankruptcy Court's authority to decide controversies regarding attorney fees is among the Article I powers of the Bankruptcy Court falling within the "summary jurisdiction" affirmed by the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*

Justice Brennan, writing for the plurality in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, Nos. 81-150 & 81-546, slip op. (U.S. June 28, 1982), stated that prior to the adoption of the Bankruptcy Act of 1978:

> The Bankruptcy Courts were vested with 'summary jurisdiction'—that is, with jurisdiction over controversies involving property in the actual or constructive possession of the Court.

Id at 2.

He proceeded to describe the important enlargement of jurisdiction under the Bankruptcy Reform Act of 1978 as follows:

> The jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system. Eliminating the distinction between 'summary' and 'plenary' jurisdiction, the Act grants the new courts jurisdiction over all 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11.' (citations omitted.)

Id at 2-3.

Implicit in the decision of the plurality are the conclusions that, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," slip op. at 20-21, and "the manner in which the rights of debtors and creditors are adjusted," *id* at 34 n. 36, form the basis of the Congressional grant to the Bankruptcy Courts.

Nothing in the plurality decision can be found to disturb the traditional jurisdiction of Bankruptcy Courts over the manner in which the rights of debtors and creditors are adjusted. In this conclusion the minority appears to agree. Justice White, in his characterization of the plurality opinion writes: "Under the plurality's own interpretation of the cases, therefore, these matters could be heard and decided by Article I judges." Slip op. at 4 (White, J. dissenting).

The dispute between the plurality and dissent in *Northern Pipeline Construction Co.* revolves to some extent around the incompletely resolved issue of the extent to which the Bankruptcy Act of 1978 exceeded the constitutionally permissible grant of summary jurisdiction originally vested in the bankruptcy courts by Congress. Central to the resolution of the issues presented in this case is the concept of the limits of the summary jurisdiction available to the bankruptcy courts.

Both the plurality, in note 31 at page 29, and the dissent, at page 8, in *Northern Pipeline Construction Co.* acknowledge the importance of the Court's prior decision in *Katchen v. Landy*, 382 U.S. 323 (1966), which established the parameters of summary jurisdiction in the Bankruptcy Courts as of 1966. However, the plurality clearly notes in its reference to *Katchen* that "when *Katchen* was decided the 1973 Bankruptcy rules had not yet been adopted...." and that in the decision "there was no discussion of the Article III issue." Slip op. at 29 n. 31.

The questions presented in this appeal provide the Court with a unique opportunity to update the *Katchen* discussion of summary jurisdiction in the Bankruptcy Courts with reference to, and in light of, the Article III issue. U.S. CONST., art. III.

The instant case involves an attorney who submitted himself to the jurisdiction of the Bankruptcy Court but claims that the amount of attorney fees which should be

allowed must be determined only by reference to state law, contract law and considerations outside the jurisdiction of the Bankruptcy Court.

Further, the Court of Appeals relies on the 1938 Second Circuit case of *In re Prudence Co.*, 96 F.2d 157, to support its contention that the Bankruptcy Court's jurisdiction does not extend to a determination of attorneys fees. The *Prudence* decision predates the 1973 Bankruptcy Rules promulgated by this Supreme Court and referred to in note 31 at page 29 of the *Northern Pipeline Construction Co.* decision.

Rules 219 and 220 of the Bankruptcy Rules both implicitly overrule the *Prudence* decision which restricts even the Article I summary jurisdiction of the Bankruptcy Courts. U.S. CONST. art. I, §8, cl. 4. The revival of the *Prudence* decision by the Seventh Circuit Court of Appeals decision below is of exceptional importance because that decision has impermissibly stripped the Bankruptcy Court of its jurisdictional duties to supervise the bankruptcy estate including the disallowance of unreasonable attorney fees, all of which the Bankruptcy Courts have been specifically authorized to do by the United States Supreme Court pursuant to Bankruptcy Rules 219 and 220.

The decision of the Court of Appeals in the instant case purports to limit what the court in its decision characterizes as the "exclusive summary jurisdiction" of the Bankruptcy Courts. The court states that:

> Bankruptcy courts are subject to some limitation in the exercise of their summary jurisdiction in circumstances such as those presented here.

671 F.2d at 230 *reprinted in* Appendix at A-1.

It must be noted that nowhere in the United States Supreme Court's discussion of summary jurisdiction in the *Katchen* decision or in prior discussions of bankruptcy

attorney fees in *Watkins v. Sedberry*, 261 U.S. 571 (1923), or *Brown v. Gerdes*, 321 U.S. 178 (1944), is a similar conclusion reached. In fact, Bankruptcy Rules 219 and 220 promulgated by the Supreme Court lead to an entirely opposite conclusion.

This case presents the Supreme Court with a rare opportunity to clarify questions of law implicitly raised by, but outside the scope of, the specific constitutional findings of the recent *Northern Pipeline Construction Co.* decision. Petitioner urges this Court to grant certiorari and address the important issues raised in this appeal.

3. The Court of Appeals as a matter of first impression and erroneously decided that a contract for attorneys fees entered into by the debtor and his counsel prior to the commencement of Chapter XI proceedings is entitled to the treatment generally afforded executory contracts pursuant to Bankruptcy Act Section 313 and Section 357(2), and is not subject to review by the Bankruptcy Court pursuant to the provisions of Bankruptcy Rules 215 and 219, which determination is one that is significant and reoccurring and has not been, but should be, decided by this Court.

Section 70b,[20] 313(1),[21] and 357(2)[22] of the Bankruptcy Act form the basis of the debtor's duty and privilege to reject executory contracts of the debtor. What constitutes an executory contract is not specifically defined by the Act. Bankruptcy Act §306(4), 11 U.S.C. §706(4) (1976). While it is an ambiguous term, it has generally been held to embrace contracts dealing with any subject matter as long as some future performance is required of the debtor. 8 COLLIER ON BANKRUPTCY, ¶2.10 at 84-86 (14th ed. 1978).

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[20] 11 U.S.C. §110(b) (1976).
[21] 11 U.S.C. §713(1) (1976).
[22] 11 U.S.C. §757(2) (1976).

The Court of Appeals determined that the contingent fee contract in question was an executory contract which was affirmed by nonaction on the part of the debtor, any creditor or the Court, and, therefore, the Court and the parties were bound by its terms. That being the case, Bankruptcy Rule 219 was not applicable.

Petitioner agrees that the contingent fee contract was an executory contract as contemplated by the definition of the term under the Bankruptcy Act. In fact, all attorneys fee contracts where future services are required in proceedings under the Act are executory if entered into prior to the commencement of the proceedings including the contract of employment between every debtor and his reorganization counsel in every case. The Court of Appeals decision is, therefore, precedent for a proposition of first impression: That every attorney fee contract entered into prior to the commencement of a proceeding is binding upon the Court and not subject to review unless the fee agreement is first affirmatively rejected.

That proposition, for which the Court of Appeals cites no authority, is without foundation in law because it ignores the special relationship between attorney and client that has resulted in the promulgation of special rules to govern that relationship in bankruptcy proceedings. The law of executory contracts is not applicable to attorney fee contracts, the law of Bankruptcy Rules 215, 219 and 220 is controlling.

The mandate of Bankruptcy Rules 215, 219 and 220 is absolute. Those rules impose upon the Court the duty to assure that no other than a reasonable fee be paid to attorneys in bankruptcy proceedings irrespective of the contractual basis of the fee requested. *Carter v. Wood*, 433 F.Supp. 291 (W.D. Mo. 1977).

The Advisory Committee on Bankruptcy Rules, established pursuant to 28 U.S.C. §331 (1976), discussed the duties and responsibilities of the Bankruptcy Court with

regard to the granting of compensation in its notes to Rule 219. The Committee stated:

> The premise for including in these rules provisions governing the allowance of compensation to officers, attorneys, and accountants is that it is peculiarly a judicial responsibility to supervise the administration of estates and in particular to assure that allowances for compensation to those rendering services in connection therewith are fair but not excessive. 3A Collier ¶62.05[3] (1961). The costs of bankruptcy administration have been a matter of continuing concern in the history of American bankruptcy law. Id. ¶62.02. This concern has led to an increasing recognition of the necessity for close judicial control of these costs.[23]

As stated by the Court in *Carter v. Wood*, 433 F.Supp at 294 in discussing the Advisory Committee's Note to 219:

> These concerns, together with the general policy in the Bankruptcy area against any "transfer of judicial power over expenditure and allowances from the court to persons who, at best, have a distinctly lesser degree of public responsibilities," 3A Collier ¶62.37, p. 1637 (1961), make clear that the law does not permit a Bankruptcy Court to contract away its obligation, under the law, to grant only reasonable compensation to attorneys for their services rendered in the administration of a bankrupt estate.

None of the legal principles addressed have been affected by the Bankruptcy Reform Act of 1978 and the issue raised remains relevant under current law.

The finding that attorney fee agreements between a debtor and his counsel are entitled to the treatment generally afforded executory contracts and are binding upon the Court unless specifically rejected makes Bankruptcy Rules 215 and 219 inapplicable to virtually

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[23] *Advisory Committee on Bankruptcy Rules. Note to Bankruptcy Rule 219 reprinted in* 12 COLLIER ON BANKRUPTCY ¶219.01 at 2-206.

every attorney fee arrangement between a debtor and his counsel in bankruptcy proceedings and is an extremely important proposition that should be addressed by this Court.

4. **The Court of Appeals erroneously determined that an order of the Bankruptcy Court authorizing a debtor to proceed with pending state court litigation is a waiver of the Bankruptcy Court's exclusive jurisdiction to determine allowance of attorney fees which determination is one that is significant and reoccurring and has not been, but should be, decided by this Court.**

At the time of the commencement of the proceeding, the debtor was a party to a condemnation action pending in the Circuit Court of Fayette County, Indiana. On December 6, 1976, the debtor filed "Debtor's Application for Authority to Go Forward with Litigation" and on the same day the Court entered its order authorizing the debtor to do so. The Court of Appeals found that by entering the order, the Bankruptcy Court relinquished its jurisdiction to the state court to determine all matters arising out of the condemnation litigation including the extent and validity of the attorney's lien charge. In arriving at its conclusion, the Court of Appeals relied solely upon the authority of *Sherman v. Buckley*, 119 F.2d 280 (2nd Cir. 1941), *cert. denied* 314 U.S. 657.

While *Sherman v. Buckley* may be authority under its specific facts for the proposition advanced, it is clear that the holding is no longer, if it ever was, applicable to Chapter XI proceedings.

In *Brown v. Gerdes*, 321 U.S. 178 (1944), the Supreme Court granted a writ of certiorari in a case similar to the situation before us except that it involved a Chapter X proceeding. The Bankruptcy Court authorized the debtor to commence an action in the New York Courts to enforce

and collect claims against former officers and directors. It also authorized the retention of attorneys to pursue the suit as was the respondent, Maley, in the instant case. In 1941, before final judgment, the attorneys were discharged. Those attorneys proceeded to bring an action in the state court to fix and enforce their liens which the state court proceeded to do. The Supreme Court found that the power to determine the amount of fees rested solely with the Bankruptcy Court after reviewing all of the sections of the Bankruptcy Act concerning Chapter X proceedings which were applicable. In discussing *Sherman v. Buckley*, this Court stated:

> Whether that case was correctly decided on its facts we need not stop to inquire. It is sufficient to say that it does not state the correct rule of law under Ch. X of the Act.

Brown v. Gerdes, 321 U.S. at 184.

Since the *Brown v. Gerdes* decision in 1944, the law with respect to the bankruptcy court's exclusive jurisdiction to review and determine attorney fee allowances has continued to evolve through subsequent amendments to the Bankruptcy Act, the promulgation of Bankruptcy Rules and court decision. The thrust of the evolution has been uniformly to support the court's exclusive jurisdiction.

Bankruptcy Rules 215, 219 and 220 which are made controlling by Rules 11-22, 11-31 and 11-32 with respect to the review and allowance of fees in Chapter XI cases are nearly identical to Chapter X Rules 10-206, 10-215, and 10-217; and those rules all follow the direction of the law as espoused by this Court in *Brown v. Gerdes*, 321 U.S. 178 (1944). As a result, *Sherman v. Buckley* no longer states the correct rule of law under Chapter XI of the Bankruptcy Act, if, in fact, it ever did. *See also Katchen v. Landy*, 382 U.S. 323 (1966).

Bankruptcy Rules 215, 219 and 220 were not affected by the enactment of the Bankruptcy Reform Act of 1978. The

issue of whether an order of the Bankruptcy Court is a waiver of the Court's exclusive jurisdiction to determine allowances of attorneys fees is a significant and reoccurring question in all bankruptcy cases which should be addressed by this Court.

5. The decision below conflicts with the decisions of other United States Courts of Appeal as to the issue of the Bankruptcy Court's jurisdiction to determine the validity and amount of attorneys fees where the attorney's claim involves a separate contract or lien.

The Court of Appeals in the instant case cited the Second Circuit case of *In re Prudence Co.*, 96 F.2d 157 (2nd Cir. 1938) in support of its conclusion that "[b]ankruptcy courts are subject to some limitations in the exercise of their summary jurisdiction in circumstances such as those presented here."[24]

The Court of Appeals further cites the later Second Circuit case of *Sherman v. Buckley*, 119 F.2d 280 (2nd Cir. 1941), *cert. denied* 314 U.S. 657, for the proposition that the order of the Bankruptcy Court allowing the debtor-in-possession to proceed with a state court lawsuit "subjected the whole of the litigation, including the settlement and liquidation of the attorney's lien charge based on Maley's contract, *to the jurisdiction of the state court.*" (Court of Appeals' emphasis.)[25]

Although the petitioner contends that neither *In re Prudence Co.* nor *Sherman v. Buckley* generally support the conclusions reached by the Court of Appeals, to the extent that the Seventh Circuit has relied upon them to reach its findings there now exists a substantial conflict with the decisions of other circuits and within the Seventh Circuit itself.

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[24]Appendix at A-19.

[25]Appendix at A-15.

No other circuit has found the summary jurisdiction of the Bankruptcy Courts to be "subject to some limitations" in a factual circumstance where jurisdiction to determine the validity and amount of a contractual or lien-based attorney fee claim has been at issue.

The Eighth, Ninth and Tenth Circuits have generally held that the jurisdiction conferred on Bankruptcy Courts to fix the compensation of counsel is paramount and exclusive in similar factual circumstances. *In re Pacific Far East Line, Inc.*, 654 F.2d 664 (9th Cir. 1981); *Sanders v. Providence Washington Insurance Co.*, 442 F.2d 461 (8th Cir. 1971); *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405 (9th Cir. 1967); *Official Creditors Committee of Fox Markets v. Ely*, 337 F.2d 461 (9th Cir. 1964); *Jackson v. Vance*, 179 F.2d 154 (10th Cir. 1949).

In addition, the instant decision is in direct conflict with a substantially similar case decided by the Seventh Circuit, namely, *In re Land Investors*, 554 F.2d 925 (7th Cir. 1976).

None of the legal principles addressed have been affected by the Bankruptcy Reform Act of 1978.The issue remains relevant and these conflicts justify the grant of certiorari to review the judgment below.

6. The decision below erroneously determined that a chose in action does not become an asset of the bankruptcy estate upon commencement of a bankruptcy proceeding in conflict with Sections 70, 311 and 342 of the Bankruptcy Act, and, further, the decision creates without precedent a separate entity called "the debtor" who may retain assets and administer them outside the jurisdiction of the Bankruptcy Court.

The Court of Appeals found that Maley never performed any legal services for the *debtor-in-possession*,[26] that the

[26]Appendix at A-16.

Bankruptcy Court erroneously considered Maley's legal services as being "services for Innkeepers as *debtor-in-possession* rather than for Innkeepers in its pre-Chapter 11 [sic] status and thereafter in the status as *debtor*";[27] that utilization of the factors normally considered in determining the reasonableness of attorneys fees "was reversible error because Maley's services were not rendered as part of the bankruptcy proceedings...."[28] Therefore, the Bankruptcy Court had no authority to review Maley's fee contract.

The finding of the Court of Appeals is clearly erroneous and has no foundation in law. Pursuant to Sections 70a(5) and 70a(6) of the Bankruptcy Act,[29] a trustee is vested with the bankrupt's title to all choses in action on the date of filing of the petition initiating the proceeding. Section 342 of the Bankruptcy Act[30] provides that where no trustee is appointed, the debtor shall continue in possession of his property and have all of the powers of the trustee, subject to the control of the court. Section 311 of the Bankruptcy Act[31] vests the Bankruptcy Court in a Chapter XI proceeding with exclusive jurisdiction of the debtor and his property wherever located.

Upon the filing of the proceeding, title to the chose in action passed to the debtor-in-possession by operation of law subject to the Court's exclusive jurisdiction. The "debtor," as the term is used by the Court below, no longer owned or possessed an interest in litigation for Maley to conduct. *See* 8 COLLIER ON BANKRUPTCY ¶6.32 at 928 (14th ed. 1978).

The decision of the Court below establishes precedent for the proposition that in a Chapter XI proceeding the "debtor" is a separate entity from the "debtor-in-

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[27]Appendix at A-16.
[28]Appendix at A-17.
[29]11 U.S.C. §110(a) (5) (1976) and 11 U.S.C. §110(a) (6) (1976).
[30]11 U.S.C. §742 (1976).
[31]11 U.S.C. §711 (1976).

possession" who may retain assets and administer them apart from the bankruptcy estate and outside the supervision of the Bankruptcy Court. The proposition is without legal precedent, potentially raises significant and reoccurring problems in the administration of Chapter XI proceedings and, inasmuch as the principles espoused by Sections 70(a), 311, and 342 were not altered by the Bankruptcy Reform Act of 1978, should be addressed by this Court.

7. The decision below fails to properly apply both Indiana law and applicable bankruptcy law to the analysis of a lien not perfected on the date of the commencement of the bankruptcy proceeding.

The Seventh Circuit opinion finds that Maley possessed a valid statutory attorney's charging lien against a judgment rendered for the debtor after the Chapter XI filing in a state court property condemnation action. The decision of the Court of Appeals completely fails to analyze the nature of respondent's alleged lien with reference to applicable bankruptcy law or state law.

The relevant section of the Bankruptcy Act is Section 67c(1)(B), 11 U.S.C. §107(c)(1)(B) (1976), which states in appropriate part that:

> The following liens shall be invalid against the Trustee:
>
> Every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision (c) of Section 70 of this act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted

> by and in accordance with the requirements of such law....

Without addressing, dismissing, or distinguishing Section 67c(1)(B), 11 U.S.C. §107(c)(1)(B) (1976), the Court of Appeals in the instant case held that the chose in action proceeds were encumbered with the perfected attorney's lien charges for Maley's services pursuant to his fully executed fee contract.

Maley's claim to a statutory lien arises from Indiana Code §33-1-3-1 (1976) which reads as follows:

> An attorney practicing his profession in any court of record in this State, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien shall be entered within sixty (60) days from the date the opinion of the higher court is recorded in the office of the Clerk of the trial court or from the date of final judgment wherein the cause is reversed and retried.

Indiana law is clear in that the cited statute is not applicable unless and until a judgment is obtained. *Kuhns v. Bech*, 147 Ind. 137, 45 N.E. 601 (1896). The attorney does not acquire the statutory charging lien until judgment is obtained, the attorney having no lien upon his client's cause of action. *Miedreich v. Rank*, 40 Ind. App. 393, 82 N.E. 117 (1907).

In the case *sub judice*, the Chapter XI petition was filed on November 17, 1976. The State Court judgment was entered on December 8, 1976.

Under Indiana law, Maley had no lien on the date the petition was filed. Despite the holding of the Court of Appeals, the correct analysis must apply the provisions of the Bankruptcy Act §67c(1)(B), 11 U.S.C. §107(c)(1)(B)

(1976), which defeats the alleged lien of Maley because said lien arose after the date of filing of the Chapter XI proceeding.

Certiorari should be granted because the Court of Appeals incorrectly interpreted Indiana law and failed to apply Section 67c(1)(B) of the Bankruptcy Act, the principles of which section have not been affected by the Bankruptcy Reform Act of 1978.

8. The decision of the Court of Appeals is erroneous in that it ignores the established principle that failure of counsel to comply with Bankruptcy Rule 215 and with the disclosure requirements of Bankruptcy Rule 219(a) and (b) is grounds for denying them compensation.

Bankruptcy Rule 11-22 makes Bankruptcy Rule 215 applicable in Chapter XI cases to employment of attorneys for the debtor-in-possession. Bankruptcy Rule 215 provides:

> (a) *Conditions of Employment of Attorneys and Accountants.* No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver....

Bankruptcy Rule 11-31 makes Bankruptcy Rule 219 applicable in Chapter XI cases. Bankruptcy Rule 219(a) provides in pertinent part:

> *Application for Compensation or Reimbursement.* A person seeking compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred, (2) the amounts requested.

Bankruptcy Rule 219(b) states:

> *Disclosure of Compensation Paid or Promised to Attorney for Bankrupt.* Every attorney for a bankrupt, whether or not he applies for compensation, shall file

> with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

In the instant case, neither Maley nor Cordes disclosed the existence of their employment contracts by affidavit as required by Rule 219(b) and Cordes failed to obtain an order authorizing his hiring and failed to file with the Bankruptcy Court a detailed statement of the services rendered by him together with his application for allowance as required by Bankruptcy Rule 219(a).

With respect to Cordes, the Bankruptcy Court found that it had not authorized his employment, that Cordes had failed to comply with the requirements of Bankruptcy Rule 219 and that, therefore, Cordes was not entitled to compensation from the estate except out of Maley's allowance. The Court of Appeals erroneously reversed the Bankruptcy Court's disallowance of compensation.

The general principle is established that when there is no compliance with rules under the Bankruptcy Act there is no right to compensation. It makes no difference whether the estate is benefitted, compensation will not be allowed. *Gochenour v. Cleveland Terminals Building Co.*, 142 F.2d 991 (6th Cir. 1944), *cert. denied* 323 U.S. 767 (1944); *Albers v. Dickinson*, 127 F.2d 957 (8th Cir. 1942).

As the Court stated in *Gochenour v. Cleveland Terminals Building Co.*, with respect to General Orders which the bankruptcy rules replaced, at 995:

> General Orders have the force of law . . . and cannot be

> by-passed by the creditors or their attorneys acting for the debtor without consent of the court. Since appellants do not bring themselves within the general order in question [requiring court approval for retention of attorneys for debtor], it is immaterial whether or not their services were beneficial....They are entitled to nothing here. (Citations omitted.)

The Court of Appeals should have addressed and applied that law to Cordes's request for fees.

The application of the principle to Maley's circumstance is equally appropriate and the Court of Appeals erred in not applying it. Maley applied to the Bankruptcy Court and was hired under a general retainer. He never filed the affidavit required by Bankruptcy Rule 219. He never disclosed to the court the existence of his alleged attorneys lien or his contingent fee agreement until November of 1979 when the Court ordered the condemnation proceeds invested subject to the "asserted liens." That was almost three years after the judgment was awarded.

Proper and orderly administration of all Chapter XI estates is dependent upon a firm application of Rules 215 and 219. The issue is one that is continuing and reoccurring. It has not been directly addressed by this Court and should be.

CONCLUSION

For all the foregoing reasons, this Court must not allow the decision below to remain as precedent, and Petitioner respectfully prays that a Writ of Certiorari to the Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

Steven H. Ancel
Ancel, Dunlap & Traylor
1770 Market Square Center
Indianapolis, Indiana 46204
317-634-9052
Counsel for Petitioner

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

IN THE MATTER OF:
INNKEEPERS OF NEW CASTLE, INC.,

Debtor,

NO. 81-1037
APPEAL OF:
ROBERT J. MALEY,

Claimant-Appellant
Cross-Appellee,

IN THE MATTER OF:
INNKEEPERS OF NEW CASTLE, INC.,

Debtor,

NO. 81-1109
APPEAL OF:
ALEXANDER HAMILTON LIFE INSURANCE
COMPANY OF AMERICA,

Cross-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 76-B-22—James E. Noland, *Judge.*

ARGUED JUNE 12, 1981—DECIDED FEBRUARY 10, 1982

Before CUMMINGS, *Chief Judge;* FAIRCHILD, *Senior Circuit Judge;* and EAST, *Senior District Judge.**

EAST, *Senior District Judge.* Claimant-appellant Robert J. Maley (Maley) appeals an order of the District Court entered in the above bankruptcy matter on December 11, 1980, which awarded attorney fees to Maley and another attorney in the undivided amount of $325,000, plus expenses, for services rendered in the defense of an action by the State of Indiana (State) seeking to condemn land and highway access owned by Innkeepers of New Castle, Inc. (Innkeepers).

Maley had entered into a contingent fee contract for his legal services with Innkeepers, but shortly before the condemnation action came to trial in state court, Innkeepers filed a petition in the District Court seeking rearrangement of its financial affairs pursuant to Chapter 11 of the Bankruptcy Act of 1898, 11 U.S.C. §§ 1, *et seq.* (1976) (Bankruptcy Act).[1] Thereafter Maley and the other attorney, Jim Cordes, successfully pursued the state court defense and recovered a substantial award for Innkeepers. Both Maley and Cordes perfected liens on the judgment in accordance with Indiana law.

The District Court refused either to give effect to the contingent fee contract or to enforce the liens, and instead set the attorney fees awards on a "reasonable fee" basis in accordance with bankruptcy law. We reverse in part, affirm in part, and remand.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation

[1]All United States Code and Bankruptcy Rules citations are to the Bankruptcy Act of 1898, as amended, and the rules promulgated thereunder, all of which were in effect at the time the bankruptcy proceedings were commenced. *See* Act of Nov. 6, 1978, Pub. L. No. 95-598, §402, 92 Stat. 2682 (reprinted as preface to 11 U.S.C. §101 (1979)).

BACKGROUND

The pertinent facts are undisputed and are best narrated in the following chronological order:

In July of 1966, Andrew and Lucille Tabor, husband and wife, were the owners of record of a 33.96 acre tract of land in Indiana which was bordered on the west for approximately 400 feet by State Road #3 and on the south by a public road which intersected with State Road #3. At that time, Andrew Tabor was the owner of the franchise for a Holiday Inn Motel which he contemplated constructing on a part of the 33.96 acre tract.

On July 8, 1966, Andrew Tabor, acting in the name of the Holiday Inn, applied to the Indiana State Highway Commission for a permit to construct a driveway entrance and exit onto State Road #3 for the use of the then proposed motel. The Commission's Permit Engineer responded with a letter to Andrew Tabor dated November 29, 1966 which purported to deny the driveway application because of a proposed widening and limitation of access to State Road #3 at that location. However, at that time no final plans had been formulated for any modification of State Road #3.

On February 24, 1967, Innkeepers of New Castle, Inc. was incorporated under the laws of Indiana for the purpose of owning and operating a Holiday Inn Motel. The principal stockholders were the Tabors who owned seventy-eight percent of the outstanding stock. Andrew Tabor was the president-treasurer, and Lucille Tabor was the vice president.

The Highway Commission eventually formulated its plans to modify State Road #3. On April 7, 1969, following fruitless negotiations, the State notified the Tabors by letter that it intended to condemn a narrow strip of land and all rights of access along the entire length of the western edge of the Tabors' tract bordering State Road #3. The letter included an offer of $7,731 in compensation for

the proposed condemnation. No separate offer of compensation was ever made to Innkeepers.

On May 31, 1969, the Tabors deeded to Innkeepers 4.82 acres out of their larger tract. Innkeepers' new tract had a frontage along the east side of State Road #3 of approximately 350 feet. The part of the original tract retained by the Tabors assumed the form of a lazy-U, fronting State Road #3 on the north and south legs of the U. The deed to Innkeepers was recorded on June 2, 1969. Financing for the Holiday Inn was obtained by Innkeepers, and construction was substantially completed by October of 1969.

On December 19, 1969, the State filed its condemnation action in the Circuit Court of Henry County. Although the State sought to condemn the entire 400 feet of frontage on State Road #3, including the frontage within the tract previously deeded to Innkeepers, and although the condemnation action was intended to have the effect of depriving Innkeepers' Holiday Inn Motel of access to the road, Innkeepers was not named as a party to the action.

The Tabors retained Maley to represent them and orally agreed to a contingent fee contract at a rate of fifty percent of any net gain received above the State's original offer. This contract, however, was not reduced to writing until May 5, 1971.

Maley filed an appearance on behalf of the Tabors in January of 1970. In August of 1970, Innkeepers opened the Holiday Inn Motel for business under the management of the Tabors. The condemnation action proceeded to the appointment of appraisers by the court. Maley filed exceptions to the appraisers' report, requested a jury trial, and began extensive preparations for trial.

In April of 1971, Andrew Tabor, acting as president of Innkeepers, agreed that Maley would also represent Innkeepers in the condemnation action. This contingent fee

contract between Innkeepers and Maley (Maley's fee contract) contained the same terms and conditions as the Tabor-Maley contract, except that no base amount would be deducted from any recovery since the State had made no prior offer to Innkeepers as an entity separate from the Tabors. Maley's fee contract, however, was not reduced to writing until January 5, 1976, and then by an addendum to the earlier dated Tabor-Maley contract.

On September 13, 1971, the court entered an *ex parte* order granting the State's motion to amend its complaint to join Innkeepers as a party defendant. Maley filed objections to the order on the grounds that it bypassed the statutory requirement that the State give the property owner ten days' written notice of the proposed condemnation along with an offer of compensation. After briefing and a hearing, Maley's objections were overruled.

Maley then obtained a change of venue to the Circuit Court in another county, and the cause was set for jury trial beginning January 5, 1976. However, before trial Maley successfully secured separate trials for the condemnation action against Innkeepers' tract and the action against the tract retained by the Tabors individually.

On January 16, 1976, the condemnation cause against the Tabors individually resulted in a judgment of just compensation and interest since the date of taking in the amount of $31,217.36. Maley was compensated for his services on behalf of the Tabors in accordance with the Tabor-Maley contingent fee contract.

During the pretrial proceedings in the action against Innkeepers, the State expounded its theory that Innkeepers was not damaged by the loss of access to State Road #3 because access could be obtained by easement across the Tabors' land to the public road lying to the south. The legal issues involved included whether Innkeepers was entitled to an easement by necessity because its parcel was landlocked, whether Innkeepers was equitably estopped

from asserting that its tract was landlocked since it knew of the proposed condemnation of access when it obtained the property and built the motel, and whether the State could pierce the corporate veil to show that Innkeepers was the alter ego of the Tabors.

Maley prevailed on these issues by obtaining, through a motion *in limine*, a bar to the State making any reference to the relationship between the Tabors and Innkeepers during the trial. The condemnation action against Innkeepers was set for jury trial on December 6, 1976. Just twenty-six days before trial, however, the cross-appellant here, Alexander Hamilton Life Insurance Company of America (Hamilton), filed a suit against Innkeepers to foreclose the construction financing mortgage on the Holiday Inn tract.

On November 17, 1976, Innkeepers responded by filing a petition in the District Court seeking rearrangement of its financial affairs pursuant to Chapter 11 of the Bankruptcy Act. The Bankruptcy Court permitted Innkeepers to retain possession of its assets and to operate the motel under court supervision. On that same date, the Bankruptcy Court authorized Innkeepers, as debtor in possession, to employ both Maley and a separate law firm on general retainer to provide representation in the bankruptcy proceedings.

On the day of trial, Innkeepers *as debtor* applied for and received authority to proceed with its litigation in the condemnation action.[2]

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[2]The Bankruptcy Court, in its recommendations to the District Court concerning the attorney fees award, erroneously stated that Innkeepers applied for authority to proceed with the litigation as *debtor in possession*. Innkeepers' request, however, was designated "Debtor's Application for Authority to Go Forward with Litigation," and the court's order stated that "the Court being duly advised in the premises now authorizes *the debtor* to proceed with the litigation." (Emphasis added). See page 14 *infra*.

On December 9, 1976, the two-day trial of the condemnation cause resulted in a jury award of $800,000 for the taking of Innkeepers' property and access to the highway. The state court entered a just compensation judgment for that amount, together with the amount of $335,254.79 accrued interest since the day of taking, for a total of $1,135,254.79.

Jim C. Cordes, an attorney at law, aided Maley as local counsel in the trial of the condemnation cause against the Tabors individually and has been compensated for his services in that trial. Cordes again performed local counsel services in the trial of the condemnation cause against Innkeepers at the request of Andrew Tabor, as president of Innkeepers. Maley and Cordes each entered their respective attorney's lien charges on the face of the judgment when it was entered.

On March 28, 1977, pursuant to an agreed entry, the Bankruptcy Court sequestered the proceeds of the just compensation judgment in favor of Innkeepers, ordering the proceeds of that judgment to be paid into the Bankruptcy Court and the priorities of the two mortgages be preserved. The order, however, ignored the perfected attorneys' lien charges.

Then followed some two and one-half years on appeal. The State appealed to the Indiana Court of Appeals resulting in a reversal of the just compensation judgment. Innkeepers appealed to the Indiana Supreme Court resulting on July 29, 1979 in the vacation of the decision of the Court of Appeals and the reinstatement of the state court's judgment of just compensation.

The clerk of the state court issued a check in the amount of $1,193,819.17 as partial payment of the just compensation judgment, payable to Maley, Cordes, and Innkeepers. On November 7, 1979, the Bankruptcy Court ordered that the check be endorsed by Maley and Cordes and delivered to Innkeepers, debtor in possession, to be

deposited in a special account and then reinvested in certificates of deposit. That order specifically provided:

> 6. The asserted attorney liens of Robert J. Maley, Esq. and Jim C. Cordes, Esq., as aforesaid, attach to said proceeds *to the same extent* as if those said funds remained in the possession of the Clerk of the Circuit Court of Fayette County, Indiana.

(Emphasis supplied).

Thereafter Maley and Cordes each applied to the District Court for allowance of their respective attorney's liens.

Maley claimed a fee in an amount equal to fifty percent of the condemnation judgment plus the post-judgment accrued interest to date less the sum of $2,131, the mutually agreed upon amount of the State's offer to the Tabors allocable to the Innkeepers' tract, and arrived at a total claim of $668,734.83. Maley also claimed $5,505.62 for expenses and $8,875 for expert witness fees.

Cordes, who had no explicit fee agreement with Innkeepers, applied for a fee of $100,000 based upon the amount of time spent on the case, the services performed, the customary compensation for local counsel, and the amount of the recovery.

The District Court referred the determination of the fee claims to the Bankruptcy Court which held a full evidentiary hearing after notice to all parties. On July 29, 1980, the Bankruptcy Court returned its formal recommendations (Recommendations) to the District Court, recommending a repudiation of Maley's fee contract and an undivided award of attorney fees to Maley and Cordes of $325,000, less than one-half of the amount called for under Maley's fee contract. The Recommendations characterized the suggested fee award as a bankruptcy administrative expense, and directed that Maley and Cordes reach an agreement as to how to divide it. In addition, the Recommendations approved Maley's claims for expenses and expert witness fees.

Maley and Cordes filed objections to the Recommendations and requested an oral hearing.

On December 11, 1980, the District Court accepted and approved the Recommendations, without granting oral argument or any hearing, and ordered payment of the attorney fees and expenses of litigation allowances as recommended.

Maley filed a timely notice of appeal from that final order. Hamilton timely cross-appealed. Cordes did not appeal, and Innkeepers did not cross-appeal.

ISSUES

1. Whether Maley's fee contract is valid under Indiana law.

2. Whether Maley has a valid statutory lien on the judgment.

3. Whether either the filing of bankruptcy proceedings or the Bankruptcy Court's order authorizing Innkeepers to proceed with the state court litigation invalidated Maley's fee contract and lien.

DISCUSSION
VALIDITY OF MALEY'S FEE CONTRACT

It is conceded by all parties and recognized by the Recommendations that Maley's fee contract with Innkeepers is in writing, dated some eleven months prior to the institution of the Chapter 11 proceedings, and calls for a fee payment in an *amount certain, viz.*, fifty percent of the net recovery. No one disputes that at the time the Chapter 11 proceedings were instituted, Maley's contract was executory in nature in that it was to be performed in the future. *See Re Jolly*, 4 B.C.D. 202, CCH Bankruptcy Law Reporter 66,793. Maley was obligated to provide competent legal services in the defense of the State's condemnation action against Innkeepers through the final disposition of

that case. Upon the completion of such services, the contract called upon Innkeepers to yield and pay the agreed fee.

There is no such thing as a tacit rejection of an executory contract under Chapter 11. Rejection must either be by affirmative action pursuant to §313 or as part of a plan of arrangement under §357(2). *Federal's Inc. v. Edmonton Investment Co.*, 555 F.2d 577 (6th Cir. 1977), teaches:

> "The failure to assume affirmatively an executory contract does not result at any time in the rejection of the contract. Whether the debtor is in possession, or whether there is a receiver or trustee, the contract can be rejected only by the affirmative action under §313(1) and Chapter XI Rule 11-53 or §357(2). Unless so rejected, the contract continues in effect."

8 Collier on Bankruptcy ¶3.15(6) (14th ed. 1976), *quoted in Federal's Inc. v. Edmonton Investment Co.*, 555 F.2d at 579.

As far as the record discloses, no creditor ever sought a rejection of Maley's executory fee contract. Neither Innkeepers as debtor in possession (standing in the legal shoes of a trustee in bankruptcy) nor the Bankruptcy Court, sua sponte, ever specifically rejected the executory fee contract.

Finally, the order of December 6, 1976 authorizing Innkeepers to proceed with the condemnation proceedings as debtor, its original status as a signatory to Maley's fee contract, did not specifically reject the executory fee contract.

It is significant to note at this juncture that neither any creditor nor the debtor in possession nor the Bankruptcy Court, sua sponte, sought the substitution of the debtor in possession for Innkeepers as a party defendant.

No one wished to subject the assets of the estate, then in the hands of Innkeepers as debtor in possession, to further administrative costs or attorney fees which might be

incurred in conducting the litigation. The reason for this state of affairs, as noted in the Recommendations, was that "the changes for a substantial recovery [were] not great." No cash advances nor other bases of further indebtedness on the part of the estate's assets were requested or authorized. We infer that all parties were willing to maintain the status quo of the litigation and that only Maley had sufficient faith that a recovery would be obtained to carry the burden of the litigation to its successful conclusion.

Maley's fee contract was not rejected until December 11, 1980, when the District Court adopted the Recommendations repudiating Maley's contract. However, the purported rejection came too late as Maley had long since fully performed his obligations under the contract with acknowledged legal expertise.[3]

The state court granting the just compensation judgment in favor of Innkeepers originally held the obligation and

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[3]Maley's qualifications and skill in handling the case were described in the Recommendations:

> Applicant Maley was well qualified to handle all of the legal matters that arose during the entire condemnation proceeding. At the present time, he has been engaged in the practice of law some 24 years and, during that time, has specialized in litigation matters. Maley also testified that since he has begun practice, that he had handled more than one hundred eminent domain proceedings. Counsel with these skills was required in the condemnation proceeding because of the intricacy and novelty of the legal questions that arose during the condemnation proceedings at the trial court level and at the Indiana Court of Appeals and the Indiana Supreme Court. These skills were best evidenced by the result obtained by applicant Maley in securing a favorable decision at trial and on appeal.
>
> Much time and effort have been devoted by applicant Maley to this cause over a period of some ten years. When Maley was retained by the debtor to pursue the debtor's rights, the probabilities for the success ultimately gained were very slight. The legal questions and maneuvering encountered were successfully overcome and, as a result, not only was new law made in Indiana but the assets of the estate of the debtor were greatly increased.

prereogative of determining the validity of the fee contract and the extent of the corresponding lien under Indiana law. The subsequent appeals stayed the exercise of that obligation. The Bankruptcy Court's order of November 28, 1977, sequestering the proceeds of the condemnation judgment, while proper, ultimately deprived the state court of the opportunity to fulfill that obligation. Thus the Bankruptcy Court assumed the duty to determine the validity of Maley's fee contract under Indiana law.

We agree with the findings in the Recommendations that Innkeepers was "unable and unwilling to compensate Maley on an hourly basis...[and] this contract is a normal type of arrangement for fees in condemnation proceedings, expecially [*sic*] when the changes for a substantial recovery are not great. ... [T]he...fee agreement was a fair one under the circumstances based upon the standards provided by Indiana law."

We hold that the fee contract between Innkeepers and Maley was a valid subsisting executory contract throughout the entire state condemnation action against Innkeepers, and Maley fully performed his part of the contract. The procedures of §313(1) or §357(2) of Chapter 11 were never utilized to affirmatively reject the contract and, as discussed below, the Bankruptcy Court's authorization for Innkeepers to proceed with the litigation as debtor did not constitute a rejection of the contract.

VALIDITY OF MALEY'S LIEN

Attorney's liens in Indiana are governed by I.C. 1971, 33-1-3-1 which provides in relevant part:

> Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record

> wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim....

In *Booram v. Day*, 25 N.E.2d 329, 330 (1940), the Supreme Court of Indiana observed:

> [S]tatutes of this character are generally held to authorize a lien upon something...recovered for...the client...and to be prompted by the same policy that entitles a mechanic to be reimbursed out of that which he creates or improves....

Maley satisfied the requirements of this statute by timely recording on the face of the judgment his intention to hold a lien in the amount called for by his valid contingent fee contract.

EFFECT OF THE BANKRUPTCY PROCEEDINGS ON MALEY'S FEE CONTRACT AND LIEN

The Recommendations concluded that due to the filing of the bankruptcy proceedings and the Bankruptcy Court's subsequent authorization of Innkeepers to proceed with the condemnation litigation, the provisions of Bankruptcy Rules 219[4] and 220[5] displaced Maley's fee contract and lien

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[4]Bankruptcy Rule 219 provides in part:

(c) *Factors in Allowing Compensation.*

(1) *General.* The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

[5]Bankruptcy Rule 220 provides in relevant part:

(b) *Payment or Transfer to Attorney, or Agreement Therefor, After Bankruptcy.* On motion by the bankrupt or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the bankrupt to an attorney after bankruptcy, whether the payment or transfer is

(Footnote continued on following page)

as the basis for determining the amount of attorney fee award. We disagree.

Innkeepers, upon its appointment as debtor in possession, held the duty to garner unto the summary jurisdiction of the Bankruptcy Court *all* of the assets of the debtor Innkeepers and to report them to that court. Among the assets of Innkeepers, the debtor, was a chose in action of constitutional origin to receive just compensation for its properties being taken by the State for a public use in the condemnation action. This chose in action was, however, encumbered with Maley's fee contract and the evolving Indiana statutory attorney's lien charges. Innkeepers fulfilled its duty by describing the chose in action and Maley's fee contract in its statement of affairs filed pursuant to §324(1) of the Act, 11 U.S.C. §724(1).

In an analogus situation, the court in *Sherman v. Buckley*, 119 F.2d 280 (2d Cir. 1941), noted that the Trustee (or, as here, the debtor in possession) was at liberty to exercise one of three options:

(1) It could have discontinued the litigation and disposed of the debtor's chose in action as best it could. Yet here, Attorney Maley's valid executory fee contract would have to have been affirmatively rejected and liquidated.

(2) It could have intervened in the state condemnation action or substituted itself in lieu of the corporate

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made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(c) *Invalidation of Unreasonable Payment, Transfer, or Obligation.* Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

Innkeepers as a necessary party defendant and taken on the furtherance of the litigation. In that event, the debtor in possession could have retained Maley as the attorney under his fee contract or under some other mutually agreeable terms of employment, or discharged Maley and employed another attorney. However, had Maley been discharged as the attorney, his valid fee contract would have to have been liquidated.

(3) It could have left the litigation in its status quo by leaving Innkeepers as debtor and Attorney Maley to fight out the litigation at their own expense, and then stepped in to claim the fruit of the recovery encumbered with Maley's attorney fee lien charge.

The third option is exactly what the debtor in possession and the Bankruptcy Court elected to do, as evidenced by the December 6, 1976 order authorizing Innkeepers *as debtor* to carry on. That order subjected the whole of the litigation, including the settlement and liquidation of the attorney's lien charge based on Maley's fee contract, *to the jurisdiction of the state court.*

> In spite of the fact that the jurisdiction of the bankruptcy court is usually described as "exclusive," it may consent to have the interests of third persons in property of which the bankrupt had possession, adjudicated in a state court if that is more convenient. [Citations]. As we have said, the [debtor in possession] got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a consent to such incidents as the exercise of that court's jurisdiction might involve....

Sherman v. Buckley, 119 F.2d at 282.

We proceed upon the simple premise that throughout the state court condemnation action against Innkeepers, Maley was performing legal services for his client Innkeepers in its pre-Chapter 11 status and thereafter in its status as the debtor, subject to the jurisdiction of the state court, with the

express approval and consent of the Chapter 11 Bankruptcy Court. Maley never performed any legal services for Innkeepers *as debtor in possession* under the direction of the Bankruptcy Court, and his fee claims do not relate to any such services.

At the time of the December 6, 1976 order granting Innkeepers *as debtor* authority to continue the litigation in the State's condemnation action, the Bankruptcy Court well knew from Innkeepers' Statement of Affairs then before it that Maley held the fee contract with Innkeepers for his legal services calling for a fee of fifty percent of the net recovery.

We specially note that at the commencement of the Chapter 11 proceedings, some twenty-six days before the trial date of the condemnation action, Maley had for all practical purposes completed his legal services by obtaining a favorable pretrial stance and developing a trial strategy and proposed trial expert evidence of damages for the loss of access. All that was left to be done was to put that legal work product to play during a short two day trial. The appeals were forced upon Maley and he served with remarkable expertise for no additional fee.

Throughout the Recommendations, the legal services of Maley and Cordes were considered as services for Innkeepers as *debtor in possession* rather than for Innkeepers in its pre-Chapter 11 status and thereafter in the status *as debtor*. The Recommendations then proceeded to repudiate Maley's valid fee contract provisions, and in lieu thereof, utilized bankruptcy law in fixing Maley's and Cordes' fees in a lower undivided amount of $325,000. The award was expressly based upon a consideration of the factors enumerated in *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967).

In *Jacobowitz*, the trustee's attorney, under appointment by the Bankruptcy Court, expended many hours during plenary proceedings in bankruptcy in performing legal

services for the estate. The attorney held no fee contract calling for an amount certain. He filed a claim in quantum meruit claiming that the measure of compensation should be the amount he would have received for the same services in private practice. *Jacobowitz* rejected the contention that such a measure of compensation is conclusive and instead adopted a bankruptcy law test of balancing the factors involved in any given case. Those factors include the size of the estate and the proportionate amount thereof recovered through the efforts of the attorney, the time expended by the attorney, the difficulty of the legal issues involved, the attorney's skill, the opposition met, and the expert evidence concerning the reasonableness of the requested fee. All of these factors are to be considered in light of the "economical spirit of the Bankruptcy Act." *Id.*

The utilization of these factors here, however, was reversible error because Maley's services were not rendered as part of the bankruptcy proceedings, but were instead performed on behalf of the debtor pursuant to a valid fee contract which antedated the filing of the bankruptcy petition and which was never rejected.[6]

This court's decision in *In re Land Investors*, 544 F.2d 925 (7th Cir. 1976), does not compel a different conclusion. That case upheld a Bankruptcy Court's utilization of a "reasonable fee" basis in determining the extent of attorney's liens against the proceeds of a state court lawsuit which had been commenced before the plaintiff filed for bankruptcy. The attorneys there had entered into a contingent fee contract with the plaintiff which, unlike Maley's contract, specified no particular fee or percentage

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[6]Even if the *Jacobowitz* test were applicable here, we note that the factor of considering the economical spirit of the Bankruptcy Act (keeping administrative expenses at a minimum), so heavily expounded in the Recommendations, was held in that case not to "require, nor justify, reducing a requested fee where, as here, by all other proper standards it is a fair and reasonable one...." *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967).

of the recovery which was to be awarded to the attorneys. Instead, the contract provided merely that the fee would be based on the amount and difficulty of the services provided and the degree of success achieved. After a favorable judgment was obtained in the state court action, the Bankruptcy Court ordered the proceeds turned over to the court.

This court upheld both the exercise of summary jurisdiction over the proceeds and the use of the "reasonable fee" standard in determining the extent of the liens. While the intervention of bankruptcy proceedings was held not to vitiate the lien, the Bankruptcy Court was found to have had "no real alternative to determining a reasonable contingent fee" due to the failure of the fee contract to specify a particular amount or percentage. *Id.* at 932.

In this case, however, Maley's fee contract specifically stated that this fee was to be fifty percent of any net recovery. It was, therefore, error to use a "reasonable fee" standard in lieu of the valid fee contract as the basis for determining the extent of Maley's lien.

The District Court's specific reliance upon *Massachusetts Life Ins. Co. v. Brock*, 405 F.2d 429 (5th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969), in approving the Recommendations is similarly misplaced. That case involved an appeal by a creditor in a Chapter 10 proceeding from the District Court's allowance of interim fees for the trustee and his attorney who held no contract for fees. The application of bankruptcy law in determining reasonable fees for the services of the trustee and his attorney was entirely correct in that cause because their services, unlike Maley's, were rendered only after the Chapter 10 proceedings had begun, only in connection with those proceedings, and only under the jurisdiction of the Bankruptcy Court.

The Bankruptcy Court here, by contract, through its December 6, 1976 order, first relinquished its "exclusive

summary jurisdiction" over Innkeepers' just compensation litigation to the state court. That necessarily included all legal incidents flowing from that state jurisdiction, including the settlement and liquidation of any perfected Indiana attorney's lien from the proceeds of a judgment entered by that court. *See Sherman v. Buckley*, 119 F.2d at 282.

The subsequent March 28, 1977 order sequestering the proceeds of that judgment was the first exercise of the Bankruptcy Court's exclusive summary jurisdiction of the proceeds of the chose in action. However, that exercise did not defeat the priority of Maley's perfected attorney fee lien.

Bankruptcy courts are subject to some limitations in the exercise of their summary jurisdiction in circumstances such as those presented here. Thus, "[w]here an attorney [is retained to seek a recovery in pending litigation] on behalf of a [client who becomes a bankrupt midstream], the filing of a petition in bankruptcy does not terminate his employment nor stay the pending [litigation]." *In re Prudence Co.*, 96 F.2d 157, 159 (2d Cir. 1938). Where the trustee or debtor in possession elects not to take over the litigation, thereby avoiding subjecting the estate to any risk of loss, the pre-bankruptcy attorney fee contract remains in effect. *Id.*

Thus, when the Bankruptcy Court sequestered the proceeds of the recovery on Innkeepers' chose in action, those proceeds were encumbered with the perfected attorney's lien charges for Maley's services pursuant to his fully executed fee contract. "Bankruptcy does not invalidate such liens." *In re Prudence Co.*, 96 F.2d at 160.

The Bankruptcy Court's order of November 7, 1979, taking over the proceeds of the Clerk's check for partial payment of the judgment, was the second attempt to exercise summary jurisdiction and foreclose the state court from acting in settlement and liquidation of Maley's

perfected attorney's lien. The Bankruptcy Court, by so doing, stepped into the shoes of the state court for that purpose,[7] and acknowledged that fact in the above quoted paragraph 6 of the order.

POST-JUDGMENT INTEREST

The Recommendations contained the erroneous conclusion that no part of the post-judgment interest accruing on the just compensation award should be awarded to Maley. Maley's fee contract provided for a fee of fifty percent of the net recovery and stated that the fee was to become due and payable when the amount of the judgment became payable to Innkeepers. The judgment became payable to Innkeepers when the just compensation judgment was entered. Therefore, interest accruing during the ensuing appeals is to be shared between the debtor in possession and Maley in proportion to their respective interests in the judgment.

The Recommendations also contain a clearly erroneous finding that Maley has been paid $2,500 of his fees. The undisputed evidence is that the notation in Innkeepers' Statement of Affairs indicating such a payment was a mistake.

The Recommendations correctly awarded Maley his personally paid expenses in the amount of $5,505.62 and the unpaid expert witness fees in the amount of $8,875.

DISPOSITION

That part of the District Court's final order fixing Maley's fee in the amount of $325,000, to be shared with Attorney Cordes as they shall agree, is reversed.

That part of the District Court's final order granting Maley the recovery of his personally paid expenses in the

[7] See *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702 (5th Cir. 1966).

amount of $5,505.62, as well as the amount of $8,875 for unpaid expert witness fees, is affirmed.

The cause is remanded to the District Court to hold an evidentiary hearing, after notice, for the purpose of determining:

(1) The total sum of the gross recovery for Innkeepers in the condemnation action under the final just compensation judgment plus all amounts of cost and expenses of litigation allowed by the Indiana courts following the appeals.

(2) The proper segregated amount of the State's ten-day letter final offer to be applied to Innkeepers' tract. From the sum of such gross recovery, the District Court shall:
   (a) Distribute to the bankrupt's estate the amount of such segregated amount of the State's final offer;
   (b) Distribute to Maley the sum of his allowed personally paid expenses and unpaid expert witness fees; and
   (c) Designate the balance of the gross recovery as the net recovery for Innkeepers.

(3) The proper amount in settlement and discharge of Maley's perfected attorney's lien pursuant to the terms of his valid fee contract under Indiana law, and shall distribute that amount to Maley from the net recovery.

(4) The proper amount in settlement and discharge of Cordes' perfected attorney's lien on the basis of quantum meruit under Indiana law, and shall distribute that amount to Cordes from the net recovery.

(5) The balance of the net recovery for distribution to the bankrupt's estate.

(6) The total sum of the amounts of all post-judgment interest paid by the State and all of the interest

> received by the Bankruptcy Court from the investments of the proceeds of the final just compensation judgment, and shall distribute that total sum of interest, first, to Maley; second, to Cordes; and, third, to the bankrupt's estate, in the proportion that their respective award relates to the total recovery from the State for Innkeepers in percentages.

All not inconsistent with the foregoing opinion.

The District Court may, if deemed appropriate, refer the hearing and determinations to a Bankruptcy Judge for recommendations.

Maley is to recover allowable costs and expenses of appeal.

CROSS-APPEAL

The subject of Hamilton's cross-appeal is now moot. The cross-appeal is dismissed with allowable costs and expenses on appeal to Maley.

REVERSED IN PART, AFFIRMED IN PART,
AND REMANDED FOR FURTHER PROCEEDINGS.
CROSS—APPEAL DISMISSED.

FAIRCHILD, *Senior Circuit Judge*, concurring. In my opinion, a court has some degree of supervisory power over attorney's fees charged for services in a case before the court. The power is derived from the relationship between the court and its officers, and it would include a decision that a literal application of a contingent fee contract would produce a fee so excessive that it could not be countenanced by the court as a matter of public policy. *See, e.g., Snow v. Mikenas*, 373 Mass. 809, 370 N.E.2d 1001, 1003 (1977) ("[A] judge is authorized to raise the question of the reasonableness of a contingent fee arrangement on his own motion where . . . the attorney intends to collect his fee from funds to be distributed through him by court order"); *Tonn*

v. Reuter, 6 Wis.2d 498, 504, 95 N.W.2d 261 (1959) ("A contingent-fee contract is always subject to the supervision of the courts as to its reasonableness"); *Harmon v. Pugh*, 38 N.C. App. 438, 248 S.E.2d 421, 425 (1978) ("[A contingent fee] contract, even though found to have been entered into fairly and in good faith and without suppression of fact, is subject...to the scrutiny of the court as to its reasonableness"); *see generally* 7 Am. Jur.2d *Attorneys at Law* §255 (1980); Annot. 77 A.L.R.2d 411.

I do not view the question of supervisory power as necessarily presented by this case. That approach would require a decision whether in these circumstances the state court or the bankruptcy court should exercise the power. The federal court decision that the amount it allowed is reasonable does not amount to a decision that the fee claimed per contract would be excessive, giving appropriate consideration to the factors incidental to contingent fee arrangements. And counsel have not argued that approach. Because I do not read this case as necessarily presenting the question of supervisory power, I concur in the opinion authorized by Judge East, and dealing with the issues which the appeal does present.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES ~~BANKRUPTCY~~ DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF	)
	) IN PROCEEDINGS
INNKEEPERS OF NEW	) FOR AN ARRANGE-
CASTLE, INC.,	) MENT
	)
DEBTOR.	) No. IP 76-22-RA

ORDER OF COURT FOR PAYMENT OF ATTORNEYS' FEES AND ALLOWANCES

This matter is now before the Court upon the recommendations of the Bankruptcy Judge for the payment of attorneys' fees, witness fees, allowances and expenses in the Chapter XI Proceedings for an Arrangement of Innkeepers of New Castle, Inc., and the Court having now considered said recommendations along with the objections of Robert J. Maley, attorney, and the response of Alexander Hamilton Insurance Company of America, Inc., now adopts the recommendations of the Bankruptcy Judge Nicholas W. Sufana in regard to payment of said fees and expenses.

In approving the fees recommended by Bankruptcy Judge Nicholas W. Sufana, the Court has attempted to follow the principles set out in the following citation from *Mass. Life Insurance Co. v. Brock*, 405 F.2d 429 (C.A. 5, 1968):

> "The public interest which is inherent in bankruptcy matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable... [and] ... fairly compensated... while at the same time doing equity to the debtor and creditors." 405 F.2d at 432-433.

It is further the opinion of the Court that said Bankruptcy Judge fully considered and then recommended a

proper allowance in this organization proceeding; and that said recommendations are fully supported based on the facts and the law as presented in said recommendation dated July 24, 1980, as more fully set forth

(H.I.)

NOW THEREFORE, the Court ORDERS payment of the following fees and expenses in connection with services rendered as reasonable and just compensation:

	Allowances	Expenses
ROBERT J. MALEY, Attorney for Debtor and Debtor in Possession (including his co-counsel Jim C. Cordes) as a final allowance	$325,000	$5,505.62
R. H. HUNNINGS Expert Witness		$8,875.00

DATED this 11th day of December, 1980.

/s/ James E. Noland
JAMES E. NOLAND, U.S. District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF	)	
	)	IN PROCEEDINGS
INNKEEPERS OF NEW	)	FOR AN ARRANGE-
CASTLE, INC.,	)	MENT
	)	
DEBTOR.	)	No. IP 76-22-RA

TO THE HONORABLE JAMES E. NOLAND, JUDGE OF THE DISTRICT COURT

RE: **RECOMMENDATIONS OF BANKRUPTCY JUDGE ON APPLICATIONS FOR ALLOWANCES**

Your Bankruptcy Judge, to whom this cause was referred, respectfully reports that the following Applications for Allowances were filed in this cause:

	ALLOW. REQ.	EXPS. REQ.
ROBERT J. MALEY Attorney for Debtor and Debtor-in- Possession (Final Allowances)	$668,734.83	$5,505.62
JIM C. CORDES Attorney for Debtor (Final Allowances)	$100,000.00	None
R. H. HUNNINGS (Expert witness fee)		$8,875.00

	ALLOW. RECOM.	EXPS. RECOM.
ROBERT J. MALEY Attorney for Debtor and Debtor-in Possession (Final Allowances)	$325,000.00	$5,505.62
JIM C. CORDES Attorney for Debtor (Final Allowances)		None
R. H. HUNNINGS (Expert witness fee)		$8,875.00

The foregoing applicants have not complied with Section 62(d) of the Bankruptcy Act and Bankruptcy Rule 219(b) concerning the disclosure of compensation paid or promised and concerning the division of compensation by the filing of affidavits disclosing same.

On December 4, 1979 your Bankruptcy Judge ordered a hearing set for December 14, 1979 at 9:30 A.M. to consider and act upon the requested allowances, a copy of which notice is attached herewith and marked "Exhibit A."

Appearing at said hearing were SIGMUND BECK and MARK CENTER for Bamberger and Feibleman, attorney for the debtor and debtor-in-possession and ROBERT J. MALEY, co-counsel for the debtor-in-possession. Also appearing were R.M. Kroger for JIM C. CORDES and JIM C. CORDES in person.

Formal objections to applications for allowances and expenses were filed on December 13, 1979 by Alexander Hamilton Life Insurance Company of America and by Citizens State Bank of New Castle, Inc., secured creditors of the debtor-in-possession. Stephen K. Smith and David M. Powlen appeared for Alexander Hamilton Insurance Co. and Citizens State Bank of New Castle, Inc. appeared by Steven H. Ancel and Sally J. O'Connor of the Ancel law firm. Andrew and Lucille Tabor, stockholders of the debtor-in-possession, appeared by Dennis D. Cole of Anderson, Indiana.

Appearing at the hearing as witnesses for Jim C. Cordes were Frank W. Messer, Jr. and Thomas L. Tarvin of Connersville, Indiana. Appearing as witnesses for Robert J. Maley were Howard Young and Donald Ward, attorneys of Indianapolis, Indiana.

Hearing of the matter was incomplete and was continued to January 14, 1980 when same parties appeared. Also at said continued hearing as a witness for Citizens State Bank of New Castle was David Kleiman, attorney of Indianapolis, Indiana.

GENERAL STATEMENT

This cause was commenced on November 17, 1976 with the filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act.

Innkeepers of New Castle, Inc. was incorporated under the laws of Indiana on February 24, 1967. The principal stockholders of the corporation are Andrew Tabor and Lucille Tabor, who own approximately 78% of the outstanding common stock of the corporation. Andrew Tabor is the President and Treasurer of the corporation. Lucille Tabor is the Vice-President, and Barbara Marting is its Secretary.

A proper evaluation of allowances in this cause requires a brief recount of the events leading up to the condemnation action and the filing of the Chapter XI proceeding.

Prior to February 24, 1967, all of the land which now belongs to Innkeepers of New Castle was owned by Andrew and Lucille Tabor jointly. On July 8, 1966 Andrew Tabor, in the name of Holiday Inn, applied to the Indiana State Highway Commission for a permit to construct a driveway entrance onto State Road 3, Henry County, Indiana, from land the Tabors then owned and which was to provide an entrance for the then proposed Holiday Inn. Tabor received a letter dated November 29, 1966 from the State's Permit Engineer which purported to deny the access application because of a proposed widening of State Road 3 at that location and because State Road 3 was proposed to be a limited access highway. At that time, plans had apparently not been finalized for any modification of State Road 3 by the State of Indiana.

Andrew and Lucille Tabor deeded to Innkeepers of New Castle, Inc. a 4.82 acre tract of land on May 31, 1969, which deed was recorded on June 2, 1969, out of a 33.96 acre trace owned by the Tabors. This 4.82 acre tract is the present location of the Holiday Inn and has a frontage facing State

Road 3 of approximately 350 feet. The Tabors' retained portion of the 33.96 acres includes a frontage to state Road 3 on each side of that deeded portion.

Financing for the construction of the Holiday Inn was obtained and construction was begun. The Inn was then substantially completed by October 23, 1969 and opened for business in August of 1970 under management of the Tabors.

Also relevant to allowances in this cause is the history of the condemnation litigation which resulted in a judgment of $1,135,254.79 in favor of Innkeepers of New Castle, Inc.

On April 7, 1969 the State of Indiana caused to be sent to Andrew and Lucille Tabor (the Tabors) a letter which offered the sum of $7,731.00 for a strip of land that fronted State Road 3 and which was to be condemned. This figure represented an amount for total compensation of the Tabor land which included that parcel of land the Tabors had previously deeded to Innkeeprs of New Castle, Inc. although no letter was sent to Innkeepers of New Castle, Inc. as owner or otherwise of that parcel of land.

Robert J. Maley was retained by the Tabors to represent them in the ensuing proceedings at a rate of 50% of any net gain received above the State's original offer. This contract was reduced to writing and executed by the Tabors and Maley on May 5, 1971. On or about April 30, 1971 Andrew Tabor, acting as President of Innkeepers of New Castle, Inc. and Robert J. Maley agreed that applicant Maley would also represent Innkeepers of New Castle, Inc. in the condemnation proceeding and this agreement was later reduced to writing by addendum to the Tabor-Maley contract and dated January 5, 1976, a period of almost five years. The contract between Maley and Innkeepers of New Castle contained the same terms and conditions as the Tabor-Maley contract except that no base amount would be deducted from any recovery since the State of Indiana had made no prior offer to Innkeepers of New Castle as an entity separate from the Tabors.

On December 19, 1969 the State of Indiana filed suit in Henry County Circuit Court to condemn a narrow strip of land along State Road 3 which included the frontage of the 33.96 acre tract owned by the Tabors and including that portion of the frontage which had been deeded to Innkeepers of New Castle, Inc. This suit also eliminated all right of direct access from these lands onto State Road 3. Named as defendants in this action were Andrew and Lucille Tabor and Citizens State Bank of New Castle, but not Innkeepers of New Castle, Inc.

On September 13, 1971 an *ex parte* order was entered in the Henry Circuit Court which granted the State's motion to amend its complaint and which joined Innkeepers of New Castle, Inc. as a party defendant to the condemnation proceeding. After objections to the procedures by which Innkeepers was made a party were overruled, the cause was venued to the Circuit Court of Fayette County.

Based upon a theory that the debtor's land was taken without proper exercise of the power of eminent domain and without just compensation, an inverse condemnation action was filed in Henry County Circuit Court, entitled Innkeepers of New Castle, Inc. v. State of Indiana, on July 24, 1972. This action was then venued to Hancock Superior Court where it is still pending.

On or about January 31, 1975 applicant, Jim C. Cordes, entered his first appearance in the condemnation proceeding pending in Fayette County Circuit Court. Applicant Cordes was retained to act as local counsel by Maley in the cause since his law practice was located in Fayette County. Trial of the cause was set for January 5, 1976, however, prior to that time, applicants Maley and Cordes were successful in separating trial of the cause of the Tabors from that of Innkeepers of New Castle, Inc. The reason for this, and also the reason for a motion in limine filed in the Innkeepers trial, was to prevent the State of Indiana from making any references to the relationship

between the Tabors and Innkeepers of New Castle. The State's case was based upon a theory that Innkeepers of New Castle was not damaged to the extent claimed by the elimination of direct access to State Road 3 because access could be gained by an easement across Tabor land to County Road 300 South which intersects with State Road 3 some 220 feet south of the parcel of land deeded to Innkeepers of New Castle.

Trial of the Innkeepers of New Castle cause was then set for December 6, 1976. In the meantime, on November 17, 1976 the debtor's petition under Chapter XI of the Bankruptcy Act was filed. Also on that date the debtor was authorized by your Bankruptcy Judge to employ the law firm of Bamberger and Feibleman and Robert J. Maley as attorneys for the debtor-in-possession under a general retainer in the Chapter XI proceedings. On December 6, 1976 an order was entered which authorized the debtor-in-possession to go forward with litigation designated as State of Indiana v. Innkeepers of New Castle, Inc. Trial of the cause was concluded and on December 8, 1976 the Circuit Court of Fayette County entered judgment in favor of Innkeepers of New Castle, Inc. in the amount of $335,254.79 in interest plus the amount of the verdict as determined by the jury in the amount of $800,000.00, or a total judgment of $1,135.254.79.

The State of Indiana subsequently filed its motion to correct errors which was denied. On October 5, 1977 the State filed its Verified Petition for Extension of Time to File Record of Proceedings for its appeal to the Indiana Court of Appeals and alleged that the Court Report had not been able to complete the transcript of the trial court proceedings. On October 13, 1977 applicant Maley filed, on behalf of Innkeepers of New Castle, Inc., a Motion to Deny Appellant's Petition for Extension of Time to File Record of the Proceedings and to Dismiss Appeal together with an affidavit secured by applicant Cordes from the trial court

reporter that the transcript of evidence had in fact been completed on September 7, 1977. The Court of Appeals granted the State's request on October 12, 1977 and extended time to November 10, 1977. On November 4, 1977 the State filed its second Verified Petition for Extension of Time to File Record of the Proceedings alleging that the transcript was still not available. On November 8, 1977 applicant Maley filed a second motion to deny the State's petition, however, the Court of Appeals again granted the State's request.

On May 16, 1978 the Court of Appeals for the First District of Indiana rendered its opinion and reversed the trial court on the basis that it was error to exclude evidence regarding the relationship between Innkeepers of New Castle, Inc. and the Tabors. A petition for rehearing was filed on June 5, 1978 and was subsequently denied. A request for transfer to the Supreme Court of Indiana was then made and on July 25, 1979 the Indiana Supreme Court rendered its opinion which vacated the decision of the Court of Appeals and reinstated the judgment entered by the Circuit Court of Fayette County.

Innkeepers of New Castle, Inc., as previously noted, began operating its motel and restaurant in August of 1970. At that time, Innkeepers major creditor was Indiana National Bank who held a note with a face value of $600,000.00 the proceeds of which were used for construction of the motel. This note was secured by a mortgage on the Innkeeper's land and building which was dated September 18, 1969 and recorded on September 25, 1970. On March 25, 1971 a note with a face value of $135,000.00 and a second mortgage on the premises were executed in favor of the Citizens State Bank of New Castle for an additional loan to the debtor.

On or about November 10, 1976 Alexander Hamilton Life Insurance Company of America, the assignee of the Indiana National note and mortgage, caused to be filed in

the Circuit Court of Henry County an action for the collection of the debt, which at that time was alleged to be in the sum of $513,704.96 in principal together with interest at the rate of 9% per annum from May 1, 1976 through May 31, 1976 and at the rate of 10% per annum from June 1, 1976 from then on, and for foreclosure of its mortgage and security interest. This action was followed on November 17, 1976 by the debtor's Chapter XI petition for an arrangement.

On January 14, 1977 a First Meeting of Creditors and a hearing regarding application for approval of a management agreement between Innkeepers of New Castle, Inc. and Brooke Inns, Inc. whereby Brooke Inns, Inc. would manage the Holiday Inn operations for the debtor-in-possession was held. This management agreement was approved by the Court on February 7, 1977.

On March 28, 1977 an Agreed Entry on Application for Appointment of Receiver, For Sequestration of Condemnation Judgment Proceeds and Rents, Issues, Income and Profits and to Require Debtor to Indemnify or Otherwise Protect Estate Against Loss was approved by the Court. Pursuant to this agreed entry, it was ordered that any proceeds from the condemnation judgment be sequestered and paid into the Court until further order of the Court and that the respective mortgages of Alexander Hamilton Life Insurance Company of America and Citizens State Bank of New Castle constitute valid and enforceable liens upon the Condemnation Judgment proceeds to the same extent and amount and with the same relative priority as such mortgages constitute valid and enforceable liens on the real estate of the debtor as described in such mortgages.

On November 15, 1979 the debtor-in-possession was granted authority to invest the proceeds of the condemnation award in the amount of $1,135,254.79 and subject to the order of sequestration which had previously been made on March 28, 1977. Attorney liens were asserted

against the proceeds of the judgment by applicants Robert J. Maley and Jim C. Cordes which had been entered on December 8, 1976 on the judgment in the amounts of $567,637.00 and $100,000.00 respectively.

On November 15, 1979 attorneys for the debtor-in-possession were ordered to file their applications for interim allowances by November 30, 1979 and hearing was set for same on December 14, 1979.

GENERAL STATEMENT OF ALLOWANCES IN REORGANIZATION PROCEEDINGS

The basis for awarding fees in a Chpater XI proceeding are generally the same as those applicable in a straight bankruptcy proceeding including the economy principle characterized in numerous decisions on the question of allowances in said cases. In this case there has been no receiver or trustee named or appointed as the debtor-in-possession has conducted the business to the present time.

The attorney for the debtor is the key person in a Chapter XI proceeding. He usually prepares and files the schedules and statement of affairs, petitions for the arrangement and all other applications and orders. He also represents the debtor at all hearings and meetings of creditors. The attorney for the debtor is responsible for objecting to claims and drafting a plan of arrangement, although in this case, a plan of arrangement has not yet been filed.

There are many standards on which a reasonable attorney fee is based. Among these standards are the time, labor and skill required, the difficulty of the questions encountered, time limits and an ability of the estate to pay. In a Chapter XI proceeding, however, the most important test is the formulation of an acceptable plan of arrangement and achieving its confirmation.

The attorney for the debtor-in-possession is appointed only on order of the court on the petition of the debtor-in-

possession. The attorney must advise and counsel the debtor on every phase of the operation such as borrowing monies, executing leases, and instituting proceedings before the court or in any other court to challenge the validity of liens on the debtor's property, and for the recovery of property. The duties for the attorney for the debtor-in-possession are often those which an attorney for a trustee in straight bankruptcy would have to perform. The law firm of Bamberger and Feibleman had advised the debtor-in-possession as to its responsibilities under the Chapter XI proceeding and have prepared all of the required applciations and orders regarding operation of the business.

APPLICATION OF ROBERT J. MALEY FOR PAYMENT OF ATTORNEY FEES

Robert J. Maley was, by order of the Court dated November 17, 1976, appointed co-counsel for the debtor-in-possession under a general retainer. Applicant Maley had also represented the debtor prior to his appointment as co-counsel for the debtor-in-possession and his application is presented in the form of a moetion for the Court to order the debtor-in-possession to pay attorney fees for services performed and based upon a contingent fee arrangement entered into between applicant Maley and Innkeepers of New Castle, Inc. on or about April 30, 1971. The first question which must be answered is whether the Court has jurisdiction to determine compensation for applicant Maley.

Allowances under the Bankruptcy Act are guided by several underlying principles, the first of these being "economy first." The Bankruptcy Act was designed for relief of debtors rather than an act for the relief of attorneys and court officers. *In re Builders & Mfger's Supply Co.*, 235 F.Supp. 453 (W.D. Pa., 1964). The second principle is that there should be no compensation to an attorney without some correlative benefit to the entirety of creditors,

Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382, 60 S.Ct. 595, 84 L.Ed. 549 (1940), and while efficiency should be rewarded, the reward must not exceed the value of the additional benefit. *Matter of United Funds Mfg. Corp.*, 53 F.Supp. 467 (W.D. Mo., 1943). The last of these principles is that no creditor or party in interest has the power to bind the court in exercise of its discretion in making allowances. 3A COLLIER ON BANKRUPTCY (14th Ed.) ¶62.05[3].

The bankruptcy court has wide discretion in the allowance or disallowance of attorney fees in bankruptcy cases under Bankruptcy Rules 219 and 220, and these rules are applicable in Chapter XI proceedings through Bankruptcy Rules 11-31 and 11-32. The responsibility for determination of compensation is one peculiarly for the bankruptcy court, *Matter of Aaron Ferer & Sons Co.*, 427 F.Supp. 350 (D.C. Neb., 1977), and normally, the bankruptcy court may examine any fee, if it is in any way related to the bankruptcy proceeding, to make a determination of reasonableness. 12 COLLIER ON BANKRUPTCY (14th Ed.) ¶220.04. Therefore, it may be safely concluded that in a normal bankruptcy proceeding, the bankruptcy court has exclusive jurisdiction to determine allowances whether the case is one of liquidation or a proceeding for an arrangement.

The situation of applicant Maley is not the normal one to confronted by the Court. Applicant Maley was first employed by the debtor some seven years prior to the initiation of these proceedings. On or about April 30, 1971 a fee agreement was entered into by the debtor and applicant Maley and said agreement was reduced to writing on or about January 5, 1976. These facts lend some credence to the argument that the fee agreement or the amount of fee generated do not run afoul of Bankruptcy Rules 219 and 220 when one of the main purposes of these rules is to protect creditors of the estate by providing a restraint on a bankrupt's opportunities to make unreasonable dispositions of his property through an arrangement for excessive

payments for legal services. See: *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 53 S.Ct. 703, 77 L.Ed. 1327 (1933).

Contingent fee agreements are not favored in bankruptcy cases and have been held to be improper. *Watkins v. Sedberry*, 261 U.S. 571, 43 S.Ct. 411, 67 L.Ed. 802 (1923). It has also been noted that contingent fee agreements may be in violation of the penal code, specifically 18 U.S.C. §155. *In re Astro-Matic Lubricare, Inc.*, 3 Bankr.Ct.Dec. 233 (M.D. Tenn. [Bankr.], 1975). Allowances based upon contingent fee agreements have been allowed, however, and those decisions have also held that the relevant inquiry is not whether the agreement is reasonable but whether the amount of compensation generated by the agreement was reasonable. *In re Don Carter*, 433 F.Supp. 291, 3 Bankr.Ct.Dec. 503 (W.D. Mo., 1977).

As a general rule, services performed prior to a petition in bankruptcy are not compensable from the bankruptcy estate except to the extent the services are beneficial to these estate. *Randolph v. Scruggs*, 190 U.S. 533, 23 S.Ct. 710, 47 L.Ed. 1165 (1903). Compensation to attorneys has been denied even where the litigation was begun prior to commencement of bankruptcy proceedings, *In re Taylor*, 28 Fed. 127 (D.C. Wyoming, 1922), and, even when such services were of ultimate benefit to the estate. *Matter of Luber*, 261 Fed 221 (E.D. Pa., 1919). However such a fee may be paid as an expense of administration in situations where counsel is "...conducting ongoing complex litigation for the benefit of the estate as compared with the general services normally rendered by bankruptcy attorneys to debtors." *Matter of Pacific Far East Line, Inc.*, 458 F.Supp. 771, at 774 (N.D. Ca., 1978).

The facts in *Matter of Pacific Far East Line, Inc.*, supra, are not unlike those here. Counsel had been hired to pursue a breach of warranty action more than three years prior to the initiation of Chapter XI proceedings by the debtor and

pursuant to a contingent fee agreement. After the Chapter XI proceedings began, counsel was appointed by the court to continue the warranty litigation as special counsel. Most of the attorney's services were performed prior to this appointment as special counsel and when the litigation was settled, an allowance of $1,500,000.00 was ordered by the Bankruptcy Court.

Two points must be noted from the District Court's opinion. First, the court noted that numerous cases have allowed fees based upon contingent fee contracts where most of the work was performed prior to the bankruptcy proceeding and that "[M]ost of these cases grounded their view upon the equitable power of the court, recognizing that the attorneys had a valid charging lien under state law." supra, at 775. The second point is that the Bankruptcy Judge had considered not only all of the "normal" factors used in determining a reasonable fee, but had used the terms of the contingent fee agreement as a guideline in fixing the fee. The District Court held this was not improper since the Bankruptcy Judge "...did not regard himself as bound by the percentage of the compensation therein contained." supra, at 775.

Pursuant to Sections 311 and 312 of the Bankruptcy Act, the Bankruptcy Court has paramount and exclusive jurisdiction over all property of the debtor upon filing of the petition. Once this jurisdiction attaches, control of administration of the estate cannot be surrendered even by the court itself, *Gross v. Irving Trust Co.*, 289 U.S. 342, 53 S.Ct. 605, 77 L.Ed. 1243 (1933), although the bankruptcy court may allow third party interests to be adjudicated elsewhere when it is convenient to do so. *Sherman v. Buckley*, 119 F.2d 280 (2d Cir., 1941). This property of the estate may be an unpaid judgment from a nonbankruptcy court. *Matter of Land Investors*, 544 F.2d 925 (7th Cir., 1976).

Although there have been cases which have held that the bankruptcy court may not determine the extent to which an attorney charging lien applies to a judgment, the Seventh Circuit Court of Appeals has stated in *Matter of Land Investors*, supra, at 933:

> "Our holding that the bankruptcy court had summary jurisdiction of the judgment proceeds necessarily in this case includes the corollary that it could determine the validity and extent of encumbrances thereto."

The Bankruptcy Court, then, clearly has jurisdiction to determine the validity of an extent of applicant Maley's attorney lien. The next question, then, is what is the extent of applicant Maley's attorney lien?

Applicant Maley's lien is based upon an Indiana statute, Ind. Code §33-1-3-1, which provides:

> "Lien of attorney.—Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney, within sixty [60] days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien may be entered within sixty [60] days from the date the opinion of the higher court is recorded in the office of the clerk of the trial court or from the date of final judgment where the cause is reversed and retried."

The purpose of this statute and other similar statutes in other jurisdictions is to protect and secure an attorney's compensation for services he has performed. 3 I.L.E., Attorney and Client §61. However, the mere filing of an intent to hold an attorney's lien on a judgment does not determine the existence of same and does not assume to fix the amount due. *State of Indiana ex rel Mock v. Blecke*, 71 Ind.App. 23, 116 N.E. 2 (1917). Therefore, the lien claimed

by applicant Maley, under Indiana law, is a claim against the judgment and the amount of that claim is a matter of judicial determination. Whether the amount of Maley's fee is computed strictly on the basis of his contingent fee agreement with the debtor or whether the fee is determined by the Court, the purpose of the Indiana attorney lien statute will be fulfilled, because in either case, Maley's fee is an expense of administration and, as such, will be paid first from the judgment proceeds.

If the fee of applicant Maley is to be determined pursuant to his contingent fee contract, several determinations must be made. Contracts are generally construed and given effect in accordance with the law of the state wherein performance is to take place. *Peresiples v. Elgin, Joliet & Eastern Railway Company*, 231 F.2d 268 (7th Cir., 1956). The Maley-Innkeepers contract was made and performed in Indiana, and as a result, the law of Indiana would normally apply in determining the validity of the contract.

In Indiana, contingent fee agreements are valid if fairly made, however, because of possible abuses, courts must carefully scrutinize these agreements. *Draper v. Zebec*, 219 Ind. 362, 37 N.E.2d 952 (1941). In addition, any agreement entered into by an attorney and his client with respect to compensation during the existence of a confidential relationship, though not void, is presumptively invalid and the burden is upon the attorney to show that the agreement is a fair one and that the compensation provided for does not exceed fair and reasonable remuneration for the services performed. *French v. Cunningham*, 149 Ind. 632, 49 N.E. 797 (1898).

There has been no evidence in this case that applicant Maley's 50% contingent fee contract was unfair or did take undue advantage of his client. Applicant Maley had already made a similar agreement with the President of the debtor corporation, Andrew Tabor, individually, for similar litigation. Innkeepers of New Castle was also,

apparently, unable and unwilling to compensate Maley on an hourly basis. The evidence also showed that this contract is a normal type of arrangement for fees in condemnation proceedings, expecially when the chances for a substantial recovery are not great. Therefore, it appears that the contingent fee agreement was a fair one under the circumstances based upon the standards provided by Indiana law.

It does not appear, however, that the amount requested by applicant Maley for his fee is completely substantiated by that agreement. The contract between applicant Maley and Innkeepers of New Castle, Inc. was reduced to writing by the parties on January 5, 1976 and provides in part:

> "It is agreed that Attorneys are to be paid a sum equal to fifty percent [50%] of that sum which is the difference between the amount of judgments finally entered in said causes, whether as a result of trial, settlement, stipulation, agreement or otherwise, and the amount of the State of Indiana's final offer as evidenced by the 'Ten Day' letter, said amount of compensation to become due and payable only at such times as the amount of judgment becomes payable to the Landowners."

Judgment was entered in favor of the debtor on December 8, 1976 in the sum of $1,135,254.79, said amount including prejudgment interest of $335,254.79. Because of the appeal by the State of Indiana, no amounts were paid on the judgment until some time shortly prior to November 7, 1979 when this Court ordered that said proceeds be invested in accordance with its prior order of March 28, 1977.

In construing contracts for compensation of attorneys, courts will seek to ascertain the intent of the parties and, ordinarily, any uncertainties will be resolved in favor of the client. 7A C.J.S., Attorney and Client §§306 and 318. The contract between applicant Maley and the debtor does not appear to be vague. The contract states in part,

"...Attorneys are to be paid a sum equal to fifty percent [50%] of that sum...of the amount of judgments finally entered..." The amount of the judgment finally entered by the Circuit Court of Fayette County was $1,135,254.79 and fifty percent of that amount is $567,627.40.

Applicant Maley has also requested that he be paid fifty percent [50%] of all postjudgment interest on the condemnation award and of all interest earned on the sequestered and invested proceeds of the judgment. The fee agreement between Maley and the debtor does not mention these items, therefore, his rights to these funds must be based upon some other right that has accrued outside of the contract.

It has been said that the purpose of postjudgment interest is to compensate the judgment creditor for the fact that he has not had the use of a certain sum of money that has been adjudged to be his. *Equifax, Inc. v. Luster*, 463 F.Supp. 352 (E.D. Ark., 1978). It does not appear that in Indiana, although the rule may be different in other states, that an attorney has an ownership interest in his client's cause of action without some type of contractual authority to the contrary. Additionally, full performance on the attorney's part is a condition precedent to a right of recovery in an action on the contract. *Scobey v. Ross*, 13 Ind. 117 (1859). Although is has been held that an attorney may be entitled to a percentage of the total recovery where the total recovery is larger than the judgment entered, e.g. *In re Edgecombe Road*, 128 App.Div. 432, 112 N.Y.S. 845, affd 194 N.Y. 545, 87 N.E. 1118 (1908), and this may be a statement of the general rule, an exception exists where the attorney-client contract is such to justify a different interpretation. 7A C.J.S., Attorney and Client §320.

The contract at issue here appears fairly clear in that applicant Maley was to be paid a percentage of the judgment awarded and no more. In addition the contract states that no fee is payable to Maley until the judgment

proceeds are payable to Innkeepers of New Castle. It therefore appears that until the State of Indiana paid the judgment proceeds, no action could be maintained on the contract because all services had not been performed and because the contract stated no fee was payable until the proceeds were payable to Innkeepers. Maley therefore only had an inchoate lien on the condemnation judgment which, in the absence of contractual language to the contrary, gave him no right to the postjudgment interest, at least until the terms of the contract had been fulfilled, which event did not occur until shortly before November 7, 1979. The amount generated under this contract, however, is only evidence of what is a reasonable fee. Federal law, particularly the Bankruptcy Act, must govern the fee to which applicant Maley is entitled.

It has been noted earlier in these recommendations that the bankruptcy court has a duty to examine attorney fees that have been paid and that the court has exclusive jurisdiction to determine allowances in a bankruptcy proceeding. It has also been noted that the general rule in a bankruptcy proceeding that services rendered prior to a bankruptcy petition are normally not compensable from the estate. Various exceptions to this general rule have developed and, as was noted by the court in *Matter of Pacific Far East Line, Inc.*, 458 F.Supp. 771 (N.D. Ca., 1978), a court can compensate these services when the nature of the services is ongoing, complex and beneficial to the estate. What must be borne in mind is that the court also stated that it was not error for the referee to use a contingent fee agreement as a guideline for setting compensation *as long as he did not feel bound by it.* In other words, the amount of compensation generated by the contingent fee agreement was only evidence as to what a reasonable fee should be, not that the agreement was automatically reasonable or that it generated a reasonable fee *per se.*

Applicant Maley has asserted that under the authority of three cases, the Court is still bound by the contingent fee agreement. The first of these cases, *In re Purdence Co.*, 96 F.2d 157 (2d Circ., 1938), involved a situation where an attorney was hired by the bankrupt more than three years prior to the bankruptcy proceeding to enforce its rights under a surety bond. A judgment was obtained and then while an appeal was pending, the petition for reorganization was filed. Trustees were appointed for the debtor and they proposed that the attorney, one Davison, continue the litigation with the bankruptcy court to determine his fee. Davison refused, stood on his 25% contingent fee agreement and continued the litigation without the trustees either affirming or disaffirming his actions. As a result of the litigation, a second judgment was obtained and 25% of that judgment amounted to some $65,000.00.

The United States Second Circuit Court of Appeals, in affirming payment of that amount to Davison, noted that the trustees had several alternatives available, including a substitution of counsel. The trustees did nothing, however, and simply allowed Davison to proceed. The Court found that Davison was not appointed attorney for the trustees but performed under his contract with the debtor and, thus, was entitled to the fee generated by that contract. The Court pointed out that it did not "think" the contract could be ignored and that even so, the value of the services was equal to that amount based upon *quantum meruit*.

This case can be distinguished from the facts here. At the time the Chapter XI petition was filed on November 17, 1976, Maley was also appointed co-counsel for the debtor-in-possession and on December 6, 1976, authority to continue the condemnation proceeding was granted. This appointment was not objected to by any party nor has Maley rejected it. At the time this appointment was made, a fiduciary relationship existed between the Court and Maley and an obligation existed to advise the Court of all

connections with the debtor. *In re Arlan's Department Stores*, Inc., [1979] 21 C.B.C. 467 (2d Cir., November 5, 1979). The fact that applicant Maley did not prepare any of the pleadings or documents in the bankruptcy proceeding and that he professes no knowledge or expertise in bankruptcy law is not acceptable. *In re Arlan's Department Stores, Inc.*, supra. The burden of bringing the contingent fee agreement to the attention of the Court or refusing the appointment as counsel for the debtor-in-possession clearly rested with Maley. If he had any doubts upon "learning" of his appointment, he still should have brought the matter to the attention of the Court, especially since he testified he knew he was to be appointed co-counsel for the debtor-in-possession.

Applicant Maley has also relied upon the case of *Sherman v. Buckley*, 119 F.2d 702 (2d Cir., 1941), as being dispositive of the issue. The *Sherman* case, however, held that a state court was allowed to determine the extent of an attorney's lien and that the trustee could not later challenge that court's jurisdiction to determine that issue after allowing submission of the issue to that court. Maley also relies upon *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702 (5th Cir., 1966). This case can also be distinguished from the facts here in that the determination of the extent of the attorney's charging lien on a settlement agreement in a nonbankruptcy court was binding upon a party to that litigation. The Court did not hold that either the trustee, who was not a party in the litigation, or the bankruptcy court was bound by the finding. The Court, in fact, noted that "[I]t may be appropriate at this point to say that the objection to the court's jurisdiction are not raised by the Trustee but by the Government." *United States v. Transocean Air Lines, Inc.*, supra, at 706.

Since the Court has jurisdiction over all property of the estate, including the condemnation judgment proceeds, it has jurisdiction to determine the extent of applicant

Maley's lien. The Court must also use its discretion in determining the allowances to be paid to attorneys in the Chapter XI proceeding, including those to be paid to applicant Maley.

Since applicant Maley is being compensated for all of his services in regard to the condemnation litigation, not only must such services performed subsequent to his appointment as co-counsel for the debtor-in-possession be examined, but an examination of all services performed prior to the filing of the petition must be conducted.

It has already been noted that applicant Maley's fee agreement with the debtor may be considered in determining a fee for his services but there are other factors which must also be considered. These factors are: (1) the size of the estate and the proportionate amount thereof recovered through the efforts of the attorney; (2) the time expended by the attorney in dealing with the matters involved; (3) the attorney's ability and experience; (4) the difficulty and intricacy of the legal propositions determined; (5) opinions evidenced touching upon the reasonableness of the fee requested; and (6) all of the above in light of the economical spirit of the Bankruptcy Act and total costs incurred in the administration of the estate as related to the size thereof. *Jacobowitz v. Double Seven Corporation*, 378 F.2d 405 (7th Cir., 1967).

The itemization of services rendered from April, 1969 to November 9, 1979 by Maley reflects that approximately 2,022 hours were expended on behalf of the debtor in the condemnation proceeding although he testified that the number of hours enumerated do not account for all of the time spent in rendering services for the debtor in the condemnation proceedings. The reason all hours are not accounted for is that he, as a normal practice, did not keep track of time spent in a case he had taken on a contingency fee basis until some time in the summer of 1976.

The legal services provided by Maley began in April of 1969 when he was hired by Andrew and Lucille Tabor to represent them regarding the ensuing proceedings by the State of Indiana for condemnation of Tabor lands and to represent Innkeepers of New Castle. The application of Maley, filed December 7, 1979, states that on or about April 30, 1971 Andrew Tabor, acting as President of Innkeepers of New Castle, Inc. and Robert J. Maley agreed that applicant Maley would be compensated in the same manner as in the Tabor suit and this agreement was later reduced to writing by addendum to the Tabor-Maley contract on January 5, 1976.

Applicant Maley shows that between April, 1969 and April 29, 1971, he expended 113.85 hours and that he had expenses of $177.97. He conducted all negotiations, prepared all pleadings and documents, and conducted the litigation all in connection with the trial of the condemnation proceeding. Applicant Maley also did all of the research and writing for the appeals to the Appellate and Supreme Courts of Indiana except for the securing of an affidavit from the reporter of the trial court which was secured by applicant Cordes.

Between April 30, 1971 and November 9, 1979, Maley shows approximately 1,888 hours of time according to his itemization of services. Approximately 1,234 hours of this time was spent after November 16, 1976, of which 988 hours were spent on research, pleading and trial preparation, and time spent at trial and on appeal. He has made no claim for any services provided in the Chapter XI proceeding other than those provided in connection with the condemnation proceeding.

At the present time the assets of the debtor's estate consists of approximately $1,250,000.00 in deposited funds and the value of the Holiday Inn and restaurant premises and business, which may have a sale value of some $800,000.00. As a direct result of the efforts of Maley and

included in the funds just mentioned, the sum of $1,135,254.79 came into the estate from the condemnation litigation.

Applicant Maley was well qualified to handle all of the legal matters that arose during the entire condemnation proceeding. At the present time, he has been engaged in the practice of law some 24 years and, during that time, has specialized in litigation matters. Maley also testified that since he has begun practice, that he had handled more than one hundred eminent domain proceedings. Counsel with these skills was required in the condemnation proceeding because of the intricacy and novelty of the legal questions that arose during the condemnation proceedings at the trial court level and at the Indiana Court of Appeals and the Indiana Supreme Court. These skills were best evidenced by the result obtained by applicant Maley in securing a favorable decision at trial and on appeal.

Much time and effort have been devoted by applicant Maley to this cause over a period of some ten years. When Maley was retained by the debtor to pursue the debtor's rights, the probabilities for the success ultimately gained were very slight. The legal questions and maneuvering encountered were successfully overcome and, as a result, not only was new law made in Indiana but the assets of the estate of the debtor were greatly increased.

The amount requested by Maley as his fee for all of the above services is $668,734.83 as of the date of his application plus 50% of the interest on the condemnation proceeds invested under this Court's authority. It should be noted that at the hearing on Applications for Allowances and Reimbursement of Expenses held on December 14, 1979 that applicant Maley, by oral motion, amended his Application for Attorney Fees, which motion was sustained by order of the Court by entry dated December 19, 1979, to provide that "...the total amount of attorney fees as requested by Robert J. Maley be reduced by that amount

over and above fifty percent (50%) of the proceeds of the judgment as set forth in the aforesaid application of Robert J. Maley in the event the combined total of the fees allowed to Robert J. Maley and Jim C. Cordes as requested exceeds fifty percent (50%) of said judgment proceeds;". Maley also requests reimbursement of expenses incurred of $14,380.62 which includes the sum of $8,875.00 representing the unpaid expert witness fee of R. H. Hunnings.

APPLICATION FOR ALLOWANCES OF JIM C. CORDES AS LOCAL COUNSEL IN THE CONDEMNATION PROCEEDING

Applicant Cordes was retained as "local counsel" on behalf of Innkeepers of New Castle, Inc. in the condemnation proceeding brought by the State of Indiana when that proceeding was venued to Fayette County and first entered his appearance in that case on or about January 31, 1975.

Most of the principles relating to allowances discussed in regard to the application of Robert J. Maley are applicable to applicant Cordes with several differences. The first of which is the fact that applicant Cordes did not have a written fee agreement with the debtor. In his application, Cordes relates that he was retained on behalf of the debtor by the primary counsel in the condemnation proceeding, Robert J. Maley. In his testimony at the hearing held December 14, 1979, Cordes stated that applicant Maley had first asked him to act as local counsel but that when he was first retained, he apparently was retained for work with the Tabor cause only. Cordes further testified that after the Tabor trial, which had been separated from that of the debtor, Andrew Tabor asked that he also represent Innkeepers of New Castle, Inc. in the trial of that cause. Although no fee arrangement was ever discussed with Cordes, he assumed he would be paid the customary fee in

Fayette County for a forwarding attorney, which was one-third of the chief counsel's award. Regarding the Tabor case, it should be noted that Cordes stated that he was paid by Andrew Tabor on either a per diem or hourly basis and not a contingent fee basis.

The second fact that distinguishes applicant Cordes from applicant Maley is that Cordes was not appointed by the Court to represent the debtor-in-possession after the Chapter XI petition was filed. In fact, the services performed by Cordes essentially ended after conclusion of the trial of the condemnation proceeding, or on December 8, 1976. Cordes did not file an itemization of his time and services performed on behalf of Innkeepers of New Castle, Inc. since he kept no records, assuming he would be compensated on a contingency basis.

Cordes, in his application, related that he performed the various services performed by local counsel, including, participation in the various conferences held prior to the trial of the condemnation proceeding. He also filed the various pleadings and documents in the Fayette County Court on behalf of Innkeepers of New Castle, Inc. and did some research.

Most important of all of his services was the extensive preparatory work into a background examination of all potential jurors for the trial. Cordes also conducted the voir dire examinations and rendered valuable assistance at the trial on December 6, 7 and 8 of 1976, all of which resulted in a favorable judgment of $1,135,254.79.

After the jury had reached its verdict, the State of Indiana attempted to interplead a mortgageholder who had not been named as a party defendant. Cordes participated in the argument to the trial court to sustain the objections of the debtor to said motion which did result in a denial of the State's motion to interplead. Thereafter the State of Indiana filed its Motion to Correct Errors and

Cordes made various checks with the trial court as to its ruling on same.

The State of Indiana was successful in its motion to have a new judge appointed for a determination on the Motion to Correct Errors after the original judge failed to make a ruling on the State's motion. When the State's Motion to Correct Errors was denied, applicant Cordes secured a copy of the State's praecipe for use on appeal.

Upon appeal, Cordes lent his time and services for securing an affidavit from the reporter of the trial court which stated that the transcript of the trial proceedings had been prepared. This affidavit was secured for use in objections made to the State of Indiana's two motions to the Court of Appeals for extensions of time to file the record on appeal because the State alleged that the transcript of the trial proceedings had not yet been completed. Cordes also discussed several other problems with Maley during the appeals process and maintained close watch on the appeals process although he has made no claim for allowances for his services rendered on appeal.

Accordingly, the Court recognized that Cordes, as did Maley, perfected his attorney lien on the judgment proceeds. However, also like applicant Maley, the Bankruptcy Court must determine the extent of that lien. *Matter of Land Investors, Inc.*, 544 F.2d 925 (7th Cir., 1976). The *Land Investors*, case is even more on point with regard to applicant Cordes because there, the attorney had an agreement for a contingent fee but the precise percentage was disputed and, as a result, the Seventh Circuit Court of Appeals pointed out that "...the bankruptcy court had no real alternative to determining a reasonable contingent fee for the Oster case. It was not obliged to accept on their face appellants' conclusions as to the amount of such a fee." *Matter of Land Investors, Inc.*, supra, at 932.

The use of forwarding attorneys has been allowed in cases and the attorneys have been allowed to share

compensation. *Application of Pinetree Associates*, 77 F.Supp. 270 (E.D. N.Y., 1948). Although this sharing of compensation may be proper where the forwarding attorney actually does perform the services, there is no duty on the bankruptcy court to calculate and allow any award. *In re Hochreich*, 89 F.Supp. 414 (E.D. Y.Y., 1950). Indeed, the court may only award one reasonable attorney fee for the same work performed regardless of the number of attorneys employed, *Cle-Ware Industries, Inc. v. Sokolsky*, 493 F.2d 863 (6th Cir., 1974); cert. den. 419 U.S. 829, and duplicate attorney fees are forbidden. *In re First Colonial Corporation of America*, 544 F.2d 1291 (3rd Cir., 1977).

The amount requested by applicant Cordes as a final allowance is in the sum of $100,000.00 together with interest thereon at a rate of 8% per annum since December 8, 1976. He has made no application for reimbursement of expenses since he has no record of expenses.

ALLOWANCES AND EXPENSES RECOMMENDED

Applicant Maley's and Cordes' services may be compensated in this case as a cost of administration because they were conducting "ongoing complex litigation for the benefit of the estate" and were most successful in benefitting the estate through that litigation. The compensation awarded, however, can only be a reasonable amount for the work performed and to permit an excessive fee would be tantamount to a removal of assets from the estate to the detriment of creditors.

Your Bankruptcy Judge having reviewed the application and amended application of Robert J. Maley and the application of Jim C. Cordes, the objections to the applications, reviewed the evidence, and having examined all of the documents and schedules along with the Statement of Affairs, and having noted on the Statement of Affairs of the debtor that applicant Maley has been previously paid $2,500.00 by the debtor, and in

consideration of all of the above and foregoing, is of the opinion and recommends that a fair and reasonable allowance as final compensation is $325,000.00 as one fee for the services performed by the applicants and that the fee ordered satisfies in full the respective liens of the parties.

Because the Court did not make any arrangements for local counsel and is not obligated to calculate a separate award and since there is no itemization of services upon which to make such calculation for applicant Cordes, your Bankruptcy Judge leaves the parties who made the arrangement to determine how the one fee allowed is to be divided between them.

Your Bankruptcy Judge does recommend the reimbursement of expenses for Robert J. Maley as attorney for the debtor and debtor-in-possession of $5,505.62 and that the sum of $8,875.00 be paid to R. H. Hunnings as payment as an expert witness in the trial of the condemnation proceeding. No request for reimbursement of expenses being made by applicant Cordes, no recommendation is made.

Copies of these recommendations without exhibits are being sent to the petitioners and parties above listed contemporaneously with the filing of the same with the Clerk of this court.

Dated this 24 day of July, 1980 at Indianapolis, Indiana.

/s/ NICHOLAS W. SUFANA
NICHOLAS W. SUFANA
Bankruptcy Judge

cc: Sigmund J. Beck and Mark A. Center, Attorneys for Debtor
Robert J. Maley, Attorney for Debtor
Jim C. Cordes, Attorney for Debtor
R. M. Kroger, Attorney for Jim C. Cordes

Steven H. Ancel and Sally J. O'Connor, Attoneys for Citizens State Bank

Stephen Smith and David Powlen, Attorneys for Alexander Hamilton Life Insurance Company of America

Dennis D. Cole, Attorney for Andrew Tabor

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1982.

Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. THOMAS E. FAIRCHILD, *Senior Circuit Judge*
HON. WILLIAM G. EAST, *Senior District Judge**

In the Matter of: INNKEEPERS OF NEW CASTLE, INC., *Debtor,*	)
No. 81-1037 vs. Appeal of ROBERT J. MALEY, *Claimant-Appellant, Cross-Appellee,*	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 76-B-22 JAMES E. NOLAND, *Judge.*
In the Matter of: INNKEEPERS OF NEW CASTLE, INC., *Debtor,*	)
No. 81-1109 vs. Appeal of ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA, *Cross-Appellant.*	)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by petitioner Innkeepers of New Castle, Inc., no

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES CONSTITUTION. ART. I, §8

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

UNITED STATES CONSTITUTION ART. III
ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

BANKRUPTCY ACT
SECTION TWENTY-FOUR (11 U.S.C. §47 (1976))[1]

§24. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

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[1] *See* the Petition, *supra* note 1.

BANKRUPTCY ACT
SECTION SIXTY-TWO d (11 U.S.C. §102(d)(1976))

A receiver or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this Act or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provisions of subdivision c of this section, the court shall withhold all compensation from such petitioner.

BANKRUPTCY ACT
SECTION SIXTY-SEVEN c (1) (11 U.S.C. §107(c)(1) (1976))

The following liens shall be invalid against the trustee:

(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid

under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further*, That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court;

(C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c.

BANKRUPTCY ACT
SECTION SEVENTY a (11 U.S.C. §110 (a)(1976))

§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the

trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment

which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

BANKRUPTCY ACT
SECTION SEVENTY b (11 U.S.C. §110(b) (1976))

The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that

a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expresely otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 311 (11 U.S.C. §711 (1976))

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 306 (11 U.S.C. §706 (1976))

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

(2) "consideration" shall include evidences of indebtedness, either secured or unsecured, stock and certificates of beneficial interest therein, and certificates of beneficial interest in property;

(3) "debtor" shall mean a person who could become a bankrupt under section 4 of this Act and who files a petition under this chapter;

(4) "executory contracts" shall include unexpired leases of real property; and

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 313(1) (11 U.S.C. §713 (1) (1976))

Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it—

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 342 (11 U.S.C. §742)

Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 357 (11 U.S.C. §757 (1976))

An arrangement made within the meaning of this chapter may include—

(1) provisions for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) provisions for the rejection of any executory contract;

(3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;

(5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement, in priority over the debts affected by such arrangement;

(7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and

(8) any other appropriate provisions not inconsistent with this chapter.

28 U.S.C. §1254 (1976)

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. §2075 (1976)

Bankruptcy Rules. The Supreme Court shall have the power to prescribe by general rules, the forms or process,

writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive rights.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at any or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rule shall be of no further force or effect after such rules have taken effect.[2]

INDIANA CODE §33-1-3-1

Lien of attorney.—Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty [60] days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien may be entered within sixty [60] days from the date the opinion of the higher court is recorded in the office of the clerk of the trial court or from the date of final judgment where the cause is reversed and retried. [Acts 1865 (Spec. Sess.), ch. 59, §1, p. 164; 1949, ch. 52, §1, p. 155.]

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[2]The final paragraph has been deleted from the current version which appears at 28 U.S.C. §2075 (Supp. IV 1980).

RULES OF BANKRUPTCY PROCEDURE

Rule 215.
EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

(a) Conditions of Employment of Attorneys and Accountants. No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

(b) Employment of Attorney or Accountant with Adverse Interest. If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or accountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make

diligent inquiry into the connections of such attorney or accountant.

(c) Employment by a General Creditor. An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(d) Employment of Attorney or Accountant on Salary. A trustee or receiver authorized to operate the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(e) Employment of Trustee or Receiver as Attorney or Accountant. The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(f) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

RULES OF BANKRUPTCY PROCEDURE

Rule 219.

COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES INCURRED IN A BANKRUPTCY CASE

(a) Application for Compensation or Reimbursement. A person seeking compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred, (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

(b) Disclosure of Compensation Paid or Promised to Attorney for Bankrupt. Every attorney for a bankrupt, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised

him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(c) Factors in Allowing Compensation.

(1) General. The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

(2) Trustee, Receiver, or Marshal. The compensation allowed by the Act to a trustee, receiver, or marshal shall be in full compensation for the services performed by him as required by the Act and by these rules, but shall not be deemed to cover expenses necessarily incurred in the performance of his duties and allowed upon the settlement of his accounts. Additional compensation may be allowed for legal or other services not required of him by the Act or by these rules, but only if such services were authorized by order of the court before they were rendered.

(3) Attorney or Accountant. Compensation may be allowed an attorney or an accountant only for professional services.

(d) Restriction on Sharing of Compensation. Except as herein provided, a person rendering services in a bankruptcy case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such

services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney for a bankrupt or for a petitioning creditor from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 220 to which he is a party, or may enter such other order as may be appropriate.

RULES OF BANKRUPTCY PROCEDURE

Rule 220.

EXAMINATION OF BANKRUPT'S TRANSACTIONS WITH HIS ATTORNEY

(a) Payment or Transfer to Attorney in Contemplation of Bankruptcy. On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the bankrupt, made directly or indirectly and in contemplation of the filing of a petition by or against him, to an attorney for services rendered or to be rendered.

(b) Payment or Transfer to Attorney, or Agreement Therefor, After Bankruptcy. On motion by the bankrupt or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the bankrupt to an attorney after bankruptcy, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(c) Invalidation of Unreasonable Payment, Transfer, or Obligation. Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

RULES OF BANKRUPTCY PROCEDURE

Rule 10—206.

EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

(a) Conditions of Employment of Attorneys and Accountants. Bankruptcy Rule 215 applies to the employment, in Chapter X cases, of attorneys and accountants by a trustee, receiver, or debtor in possession. In addition, an attorney appointed to represent a trustee shall be disinterested as specified in Rule 10—202(c)(2). Notwithstanding the foregoing, the court may, when it is in the best interest of the estate, authorize the employment for special purposes to be set out in the order, other than to represent the trustee in conducting the case, of an attorney who is not disinterested provided that such attorney represents or holds no interest adverse to the estate in the matters upon which he is to be engaged.

(b) Employment of Attorney Not Disinterested. Any attorney who was not disinterested as required by subdivision (a) of this rule and who failed to disclose any material fact on the question of his disinterestedness may be denied the allowance of compensation or reimbursement of expenses, or both, and any allowance to the trustee may also be denied if it shall appear that he failed to make diligent inquiry into the connections of such attorney.

RULES OF BANKRUPTCY PROCEDURE

Rule 10—215.

COMPENSATION FOR SERVICES AND REIMBURSEMENT OF EXPENSES

(a) Application for Compensation and Reimbursement. A person seeking compensation from the estate for services or reimbursement of necessary expenses shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred; (2) the amounts requested; and (3) the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the filing of a petition commencing a case under the Act. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not he applies for compensation, shall file with the court on or before the first date set for the meeting held pursuant

to Rule 10—212, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(c) Factors in Allowing Compensation and Reimbursement of Expenses.

(1) General. (A) Reasonable compensation for necessary services and reimbursement of necessary expenses incurred in a Chapter X case may be allowed by the court to the trustee, receiver, examiner, and their attorneys, the attorney for the debtor in possession, the attorney for the debtor, and such other persons as may be authorized to assist the trustee, receiver, examiner, or debtor in possession. (B) Reasonable compensation and reimbursement of expenses may be allowed by the court to creditors and stockholders, committees or representatives of creditors or stockholders, indenture trustees, depositaries, reorganization managers, and any other parties in interest, and the attorneys or agents for any of them, except the Securities and Exchange Commission, for services which are beneficial in the administration of the estate, for services which contribute to a plan which is approved or to the approval of a plan whether or not such plan is confirmed, for services which contribute to a plan which is confirmed or to the confirmation of a plan, and for services rendered in opposing a plan confirmation of which has been refused. (C) Reimbursement of expenses, including reasonable attorney's fees, incurred by the petitioning creditors may be allowed by the court.

(2) Superseded Case. If the Chapter X petition was filed

in a pending bankruptcy case or the Chapter X case was originally commenced under Chapter XI, the court may allow, if not already allowed, reasonable compensation for services rendered and reimbursement of expenses to a marshal, receiver, or trustee as allowed by the Act, to the attorney for petitioning creditors, to the attorney for the bankrupt or debtor, to the attorney for the debtor in possession, and to any other persons and their attorneys entitled to compensation under the Act or Rules in such bankruptcy or Chapter XI case.

(3) Attorney or Accountant. Compensation may be allowed an attorney or an accountant only for professional services.

(4) Denial of Allowances. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the case in a representative or fiduciary capacity who at any time after assuming to act in such capacity has, without the approval of the court, purchased or sold claims against, or stock of, the debtor or beneficial interests direct or indirect in such claims or stock, or by whom or for whose account such claims, stock, or beneficial interests therein have been otherwise acquired or transferred.

(5) Dismissal or Conversion to Bankruptcy. On the dismissal or conversion of a case to bankruptcy pursuant to Rule 10—308, the court may allow reasonable compensation for services rendered and reimbursement of expenses incurred in the Chapter X case by any persons entitled thereto under this rule.

(d) Restriction on Sharing of Compensation. Except as herein provided, a person rendering services in a Chapter X case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This

rule does not prohibit an attorney or accountant from sharing his compensation as a trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney, other than one employed pursuant to Rule 10—206, from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 10—217 to which he is a party, or may enter such order as may be appropriate.

RULES OF BANKRUPTCY PROCEDURE

Rule 10—217.

EXAMINATION OF DEBTOR'S TRANSACTIONS WITH ITS ATTORNEY

(a) Payment or Transfer to Attorney in Contemplation of the Filing of a Petition Under the Act. On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Act by or against it, to an attorney for services rendered or to be rendered.

(b) Invalidation of Unreasonable Payment or Transfer. Any payment or transfer examined under this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The court may enter an order in favor of the estate in the amount of any excess found to have been paid or transferred.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—11.

SCHEDULES, STATEMENT OF AFFAIRS, AND STATEMENT OF EXECUTORY CONTRACTS

(a) Schedules and Statements Required. The debtor shall file with the court schedules of all his debts and all his property, a statement of his affairs, and a statement of his executory contracts, prepared by him in the manner prescribed by Official Forms No. 11—F5 and either No. 11—F6 or No. 11—F7, whichever is appropriate. The number of copies of the schedules and statements shall correspond to the number of copies of the petition required by these rules.

(b) Time Limits. Except as otherwise provided herein, the schedules and statements, if not previously filed in a pending bankruptcy or Chapter XII case, shall be filed with the petition. A petition shall nevertheless be accepted by the clerk if accompanied by a list of all the debtor's creditors and their addresses, and the schedules and statements may be filed within 15 days thereafter in such case. On application, the court may grant up to 30 additional days for the filing of schedules and the statements; any further extension may be granted only for cause shown and on such notice as the court may direct.

(c) Partnership. If the debtor is a partnership, the general partners shall prepare and filed the schedules of the debts and property, statement of affairs, and statement of executory contracts of the partnership.

(d) Interests Acquired or Arising After Petition. Bankruptcy Rule 108(e) applies in Chapter XI cases except that the supplemental schedule need not be filed with respect to property or interests acquired after confirmation of a plan.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—22.

EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

Bankruptcy Rule 215 applies in Chapter XI cases to the employment of attorneys and accountants for a trustee, receiver, debtor in possession, or creditors' committee selected pursuant to Rule 11—27.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—31.

COMPENSATION FOR SERVICES AND REIMBURSEMENT OF EXPENSES

Bankruptcy Rule 219 applies in Chapter XI cases. Reasonable compensation for services beneficial to the estate and reimbursement of necessary expenses may be allowed to the attorney for the debtor and debtor in possession whether or not a plan is confirmed.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—32.

EXAMINATION OF DEBTOR'S TRANSACTIONS WITH HIS ATTORNEY

Bankruptcy Rule 220 applies in Chapter XI cases.

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CLERK

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INNKEEPERS OF NEW CASTLE, INC.,
Petitioner,

vs.

ROBERT J. MALEY, ALEXANDER HAMILTON
LIFE INSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT ROBERT J. MALEY'S BRIEF IN OPPOSITION

Robert J. Maley
HARRINGTON, MALEY, GARDNER
& SAYER
Third Floor, Peoples Building
Richmond, Indiana 47374
(317) 966-0642

Counsel for Respondent,
Robert J. Maley

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals committed error in holding that an attorney's contingent fee contract to conduct state court litigation and the resulting attorney's charging lien on the judgment finally obtained in that litigation would be examined pursuant to state law, when the contract predated the institution of proceedings under Chapter XI of the Bankruptcy Act of 1898 by many years and the then pending litigation was turned back over to the debtor to proceed with outside of the bankruptcy administration, by order of court?

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No. 81-221

IN THE

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OCTOBER TERM, 1982

INNKEEPERS OF NEW CASTLE, INC.,
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ROBERT J. MALEY, ALEXANDER HAMILTON
LIFE INSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT ROBERT J. MALEY'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Certain facts were omitted or distorted in Petitioner's Statement of the Case which are necessary to accurately depict the unique factual situation here involved. Most simply stated, the record supports the statement that follows.

A litigation attorney (MALEY) was employed in 1971 by a corporation (INNKEEPERS) under a valid and subsisting contingent fee contract to pursue an action in eminent domain in state court on behalf of a corporate client. After extensive proceedings in the state court, including successfully obtaining key rulings on pretrial motions, the attorney "had for all practical purposes completed his legal services by obtaining a favorable pretrial stance and developing a trial strategy and proposed trial expert evidence of damages..." and the trial was scheduled to begin on December 6, 1976.[1] The corporate client (INNKEEPERS), employing the services of another law firm (BAMBERGER & FEIBLEMAN) with expertise in bankruptcy proceedings, because a mortgage foreclosure action had been filed against it, filed a Chapter XI petition twenty-six days before the trial date of the condemnation action. BAMBERGER & FEIBLEMAN, on behalf of INNKEEPERS, filed a petition and obtained an order from the Bankruptcy Judge authorizing INNKEEPERS, as *debtor*, to proceed with the condemnation action in state court. At this time "all that was left to be done (by the attorney to complete his services required of him under his contract) was to put that legal work product to play during a short two day trial."[2] The trial resulted in a substantial judgment in favor of

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[1]Opinion of Court of Appeals 671 F.2d at 229 Appendix, p.A-16

[2]Opinion of Court of Appeals 671 F.2d at 229 Appendix, p. A-16

INNKEEPERS to which the litigation attorney (MALEY) immediately perfected his attorney's lien for fees. An appeal to the Indiana Court of Appeals reversed the trial court and he appealed to the Indiana Supreme Court which reinstated the judgment. The Court of Appeals decision points out that these appeals were forced upon the attorney and that he served "with remarkable expertise with no additional fee."[3] The first payment on the judgment was made on the 9th day of November, 1979, and the Bankruptcy Judge ordered that those funds be turned over to the debtor-in-possession under supervision of the bankruptcy court, and invested.[4] This order preserved the attorney's lien on the funds as fully as if they had remained in the possession of the Clerk of the state court.

The bankruptcy court at that time ordered the attorneys asserting liens against the condemnation award proceeds to file their application for allowances for attorneys' fees in connection with the judgment. By the same entry BAMBERGER & FEIBLEMAN were directed to file their application for interim allowances.[5] The application of BAMBERGER & FEIBLEMAN for $27,500.00 interim attorney fees for services to the debtor-in-possession, and $2,952.91 for expenses, was allowed in full as an expense of administration.[6] The application of MALEY for payment of his attorney fee pursuant to the contingent fee contract of 1971 as a lien on the judgment and out of the proceeds of that judgment, was set for formal hearing by the court. Objections and briefs in opposition were filed by the attorneys for Alexander Hamilton Life Insurance Company of America and by the firm of Friedlander, Mierhoof & Ancel, P.C., the law firm of which the present

[3]Opinion of Court of Appeals 671 F.2d at 229 Appendix, p. A-16

[4]Record, Vol. 1, pp. 111-114.

[5]Record, Vol. 1, p. 116

[6]Record, Vol. 1, p. 309

petitioner's special counsel, Steven Ancel is a member, on behalf of his client, Citizens State Bank, a secured creditor. These proceedings resulted in the Recommendations entered by the Bankruptcy Judge on July 24, 1980.[7] These Recommendations made certain specific findings of fact which are here pertinent. The Bankruptcy Judge found:

> There has been no evidence in this case that applicant Maley's 50% contingent fee contract was unfair or did take undue advantage of his client. Applicant Maley had already made a similar agreement with the President of the debtor corporation, Andrew Tabor, individually, for similar litigation. Innkeepers of New Castle was also, apparently, unable and unwilling to compensate Maley on an hourly basis. The evidence also showed that this contract is a normal type of arrangement for fees in condemnation proceedings, expecially [sp] when the chances for a substantial recovery are not great. Therefore, it appears that the contingent fee agreement was a fair one under the circumstances based upon the standards provided by Indiana law...[8]
>
> Applicant Maley was well qualified to handle all of the legal matters that arose during the entire condemnation proceeding. At the present time, he has been engaged in the practice of law some 24 years and, during that time, has specialized in litigation matters. Maley also testified that since he has begun practice, that he had handled more than one hundred eminent domain proceedings. Counsel with these skills was required in the condemnation proceeding because of the intricacy and novelty of the legal questions that arose during the condemnation proceedings at the trial court level and at the Indiana Court of Appeals and the Indiana Supreme Court. These skills were best evidenced by the result obtained by applicant Maley in securing a favorable decision at trial and on appeal.

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[7]Appendix, pp. A-26-54

[8]Recommendations, Appendix, p. A-40

> Much time and effort have been devoted by applicant Maley to this cause over a period of some ten years. When Maley was retained by the debtor to pursue the debtor's rights, the probabilities for the success ultimately gained were very slight. The legal questions and maneuvering encountered were successfully overcome and, as a result, not only was new law made in Indiana but the assets of the estate of the debtor were greatly increased.[9]

The bankruptcy court based its decision solely on the conclusion that it had jurisdiction to determine the validity of the attorney's lien because it had jurisdiction over all of the property of the debtor-in-possession, including the proceeds of the condemnation judgment. It had taken jurisdiction of the condemnation proceeds by an agreed order to sequester, which order was agreed to by BAMBERGER & FEIBLEMAN as attorneys for the debtor-in-possession, Steven Ancel as attorney for Citizens State Bank and the attorneys for the first mortgage holder, Alexander Hamilton Life Insurance Company of America. Once having taken possession of the funds pursuant to that order the court found it unnecessary to determine the validity of the attorney's lien on the judgment since it was to order that the attorneys' fees were to be paid as a matter of first priority as an administrative expense. The District Court adopted the Recommendations of the Bankruptcy Judge in toto, and the appeal to the Seventh Circuit, which is here challenged, resulted.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Court of Appeals' decision in the instant case deals with a peculiar and unique situation. An action in eminent domain pending in the state court was set for trial at the

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[9]Appendix, p. A-48

time the land-owning corporation sought legal assistance from bankruptcy attorneys following the institution of a mortgage foreclosure action against it. The corporation under directions of its bankruptcy attorneys instituted a Chapter XI proceeding. The bankruptcy attorneys, and presumably the bankruptcy court as informed and influenced by the bankruptcy attorneys, did not want the debtor-in-possession burdened with what appeared to be fruitless and risky litigation. The state condemnation action was turned over to the *debtor* within a month after the bankruptcy proceedings had begun, on the very day the eminent domain case was set to proceed to trial by jury in the state court. This was a safe procedure for the debtor-in-possession since the estate could not be adversely affected. No expenses could be incurred by the estate since the litigation attorney was bound by his contingent fee contract, and the entire risk of loss fell on his shoulders. It was only after a successful judgment in the condemnation case that the attorneys for the secured creditors and the bankruptcy attorneys representing the debtor-in-possession became interested in the matter and proceeded to enter a so-called "agreed order" sequestering any fund resulting from the judgment. The application for Authority To Invest Condemnation Award Proceeds, filed with the court and distributed to all counsel of record, contained a photocopy of the judgment with the attorneys' liens written upon its face.[10] Respondent's lien set forth the specific amount of the lien pursuant to a written contingent fee contract. The debtor-in-possession's Statement of Affairs also set forth the respondent's lien under his contingent fee contract, together with its terms.[11] Thereafter, the attorneys for the debtor-in-possession did nothing regarding the eminent domain case other than

[10]Record, Vol. 1, pp. 104-110

[11]Record, Vol. 1, pp. 52, 55, 57, 75, 85

report periodically to the court that the matter was on appeal in the state courts. The attorneys for the secured creditors likewise did nothing but inquire as to the progress of the appeals. No one, including the court, voiced objection to respondent's handling of the difficult and protracted appellant procedures which first resulted in a reversal in the Court of Appeals and finally in an affirmance of the judgment in the Indiana Supreme Court. Further proceedings in the state court were necessary to collect the judgment and to collect additional interest thereon. Respondent was not paid any fee or reimbursed for his considerable expenses in the handling of the state court litigation and appeals. It was not until after the first payment on the judgment that the court ordered respondent to file his application for fees. Respondent proceeded upon a petition for payment of fees and honoring of his state court lien on the judgment. Only at this point did the secured creditors challenge respondent's contingent fee, contract and asserted lien based thereon. The attempt of the secured creditors, which reeks of unfairness and inequity, to sit back and do nothing thereby allowing MALEY to continue his efforts in the state court action and carry the burden, risks and costs throughout a lengthy appeal process and only then challenge his prearranged fee was not joined by INNKEEPERS. The president of INNKEEPERS in fact testified in open court that he intended to honor the contract. The debtor-in-possession never repudiated its contingent fee contract with the respondent and presented no opposition to his petition for payment of his fees based upon the contract and lien at the hearing.

The Bankrupcty Judge recognized that the factual situation was unique stating in his Recommendations: "The situation of applicant, Maley, is not the normal one to be confronted by the court..."

The decision of the Seventh Circuit Court of Appeals found that the bankruptcy court had assumed jurisdiction

over the proceeds of the judgment and thereupon erroneously determined the amount of the attorney's charging lien pursuant to certain standards generally applicable to federal bankruptcy fee allowances. The Court of Appeals thereupon remanded the matter of the federal court to enter judgment pursuant to the Contract as valid under state law.

Petitioner urges that a writ of certiorari be granted, arguing that the Court of Appeal's decision stands as precedent for a denial of the jurisdiction of federal courts to determine fee matters in bankruptcy. Such an extended and far-reaching interpretation of the decision is not justified by the facts of the case.

Petitioner envisions that the jurisdictional power of the bankruptcy court to supervise the hiring of attorneys and the allowance of attorney fees in bankruptcy proceedings is challenged by the Court of Appeal's decision in the instant case in that it conflicts with the mandate of the Bankruptcy Rules, in particular Bankruptcy Rules 215 and 219. Respondent contends that the Bankruptcy Rules are not challenged but simply are not called into play by the particular factual situation here presented. Petitioner then argues that the bankruptcy court's authority to decide controversies regarding attorney fees is among the Article I powers of the bankruptcy court falling within "summary jurisdiction" and then extends from this argument an attempt to connect this case with the recent Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 102 S. Ct. 2858 (1982). Petitioner cites a statement of the court to the effect that bankruptcy courts are subject to some limitation in the exercise of their summary jurisdiction in circumstances such as those presented in this case. Respondent contends that the Court of Appeals was correct in distinguishing the facts in the instant case from those in which the bankruptcy court normally exercises summary jurisdiction. Next, the

petitioner erroneously asserts that the Court of Appeal's decision is precedent for the proposition that every executory attorney fee contract entered into prior to the commencement of a bankruptcy proceeding is binding and not subject to review unless the executory fee contract is first affirmatively rejected. Respondent would urge that such was not the holding of the Court of Appeals in that such a proposition goes far beyond the facts here presented and the Court's holding. Furthermore, the attorney fee contract was in fact reviewed by the Bankruptcy Court against both state standards and the so-called federal bankruptcy standards. The Court of Appeals remanded the case to the federal court, not to the state court, on the basis that the reviewing court has already made the necessary findings to establish the validity of the contract under state law. Petitioner also urges that the Court of Appeals' decision is authority for the principle that the bankruptcy court, in ordering debtor to proceed with pending court litigation, waived or abandoned its exclusive jurisdiction to determine attorney fees, which petitioner asserts is improper. Respondent would point out, however, that the court's *holding* is only that state law will determine the validity of a contingent fee contract and the lien arising upon the resulting judgment which occurs outside the administration of the bankruptcy estate.

Petitioner then asserts that the Court of Appeals was in error in determining that a chose in action does not become an asset of the bankruptcy estate; was in error recognizing the distinction between debtor and debtor-in-possession, and was in error in interpreting Indiana law and failing to properly apply §67(c)(1)(B) of the Bankruptcy Act. Respondent would assert that the Court of Appeals made no error in any of these regards and would further point out that no ligitimate assertion is made by petitioner which would be grounds for an issuance of a writ of certiorari for these reasons.

Petitioner urges that the Court of Appeals' decision conflicts with the decisions of courts of appeal for other circuits, which must be viewed as its prime assertion that the writ should be granted. Respondent would point out that none of the cases cited in support of this proposition represents a holding which conflicts with the instant decision, and in fact the 9th Circuit decision cited by petitioner actually supports the proposition that the attorney's lien and contract are to be determined by state law. The other decisions are based upon entirely different and distinguishable factual situations and present no conflict.

At many junctures of his argument counsel for the petitioner has urged that the factual situation in the instant case is a frequently "reoccuring" [sp] situation which deserves the attention of the United States Supreme Court. Respondent would submit, however, that the factual situation dealt with by the Court of Appeals is a singular and unique situation. Respondent recalls Judge Sufana's words: "The situation of Applicant Maley is not the normal one to (be) confronted by the court".[12]

Petitioner's attorney, Ancel, attempts to make the Seventh Circuit decision appear to have far-reaching significance as an attack on the supervisory power of the bankruptcy courts over attorneys. The case is indeed unique despite Mr. Ancel's assertations that the matter arises frequently. The problem of litigation pending when a bankruptcy petition is filed is usually resolved by discharging the litigation attorney and having the attorney for the trustee take over the litigation himself, thereby increasing his services and his fees. The litigation attorney, having been discharged, would be reluctant to give up his

rights under his contingent fee contract and accept employment by the trustee on some different basis. The Bankruptcy Act of 1978 removed any question concerning the employment of counsel on a contingent fee basis which alleviates the problem in the future. This position is reflected in House Report No. 95-595 referring to §328 of the new Act.[13] The situation where the pending litigation is dumped off on the debtor and his contingent fee litigation counsel generally occurs only where the bankruptcy lawyer can detect no reasonable opportunity for success and therefore no reasonable expectation of an increased fee. Such cases seldom come to the attention of the appellant courts for the reason the judgment of the bankruptcy attorney is usually accurate as to the value of the litigation, and no substantial fee develops under the contingency basis.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE BANKRUPTCY RULES

There is no issue presented which involves the application of Bankruptcy Rules 215 and 219. Bankruptcy Rule 215 provides that *no attorney for the trustee* or receiver shall be employed except upon order of the court. Rule 219(a) provides that a person seeking compensation for services *from the estate* must file an application, 219(b) requires a disclosure statement setting forth the compensation paid or promised to be paid for services rendered or to be rendered *in connection with the bankruptcy proceedings*, and 219(c) provides that compensation allowed an attorney entitled to compensation for services rendered in the *administration of a bankrupt's estate* shall be reasonable.

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[13]This section authorizes the trustee, with the court's approval, to employ professional persons under any reasonable terms, including on a retainer, on an hourly, or on a *contingent fee basis* (emphasis added).

BR 11-31 reflects that BR 219 applies in Chapter XI cases and this is directed to the disclosure of fees paid or to be paid to attorneys representing the debtors-in-possession, but there is no reference available under Rule 219 as to the payment of fees by the debtor except for those fees which have been paid during the preceding year.

Collier on Bankruptcy, 14th Ed., Vol. 14, §11-103, recites that the second section of Rule 11-31 is of particular import in Chapter XI cases and finds no parallel in Bankruptcy Rule 219, and accordingly treated the same separately. Comments throughout such discussion constantly differentiate between attorney for the debtor and attorney for the debtor-in-possession. Rule 11-22 makes Rule 215 applicable to Chapter XI cases in the employment of attorneys for a trustee, receiver, debtor-in-possession, or creditor's committee. The simple fact is that the services rendered by respondent MALEY to the debtor were in no way rendered in administration of the debtor-in-possession's estate in the bankruptcy court.

Carter v. Woods, 433 F. Supp. 291 (W.D. Mo. 1977) was cited by the petitioners as authority. In that case the contract was made between the trustee and his attorney with Court approval *after* the voluntary petition in bankruptcy was filed. The district court refused to reverse the bankruptcy court's award of a sum less than provided by the contract holding that a bankruptcy court was not permitted to contract away its obligation to grant only reasonable compensation to attorneys for their services rendered in the administration of the bankrupt's estate. This is a distinctly different factual situation from the case at bar, which is a Chapter XI proceeding where proceedings are less formally supervised, and the contract *preceded* the proceeding in bankruptcy by many years. The bankruptcy court, in its Recommendations, recognized the inapplicability of Bankruptcy Rules 219 and 220, stating:

> ...Applicant Maley was first employed by the debtor some seven years prior to the initiation of these proceedings. On or about April 30, 1971 a fee agreement was entered into by the debtor and applicant Maley and said agreement was reduced to writing on or about January 5, 1976. These facts lend some credence to the argument that the fee agreement or the amount of fee generated do not run afoul of Bankruptcy Rules 219 and 220 when one of the main purposes of these rules is to protect creditors of the estate by providing a restraint on a bankrupt's opportunities to make unreasonable dispositions of his property through an arrangement for excessive payments for legal services. See: Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 53 S.Ct. 703, 77 L.Ed. 1327 (1933).

The Court of Appeals proceeded upon the simple premise that throughout the state court condemnation action MALEY was performing legal services for his client in its pre-Chapter XI status and thereafter in its status as debtor. None of the fee claims by MALEY relates to services for INNKEEPERS as debtor-in-possession in the administration of the bankrupt's estate.

THERE IS NO LIGITIMATE RELATIONSHIP BETWEEN THE INSTANT CASE AND THE RECENT DECISION IN *NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE COMPANY*

The Court of Appeals' decision cannot be interpreted as conflicting with the recent decision of this court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, supra, despite the convoluted attempts by petitioner's counsel to find reasons for granting the writ in the wording of that divided decision. Reduced to its most understandable essentials, petitioner's argument is that the Court of Appeal's decision has impermissibly stripped

the Bankruptcy Court of its jurisdiction to determine the allowance of attorney fees in a proceeding in bankruptcy. The Court of Appeal's statement that:

> Bankruptcy courts are subject to some limitation in the exercise of their summary jurisdiction *in circumstances such as those presented here.* (emphasis added) 671 F.2d at 230.

gave rise to petitioner's objections. The Court of Appeals pointed out that these special circumstances existed where the trustee or debtor-in-possession elects not to take over pending state court litigation, thereby avoiding subjecting the estate to any risk of loss. The pre-bankruptcy attorney fee contract, not having been terminated by operation of law upon the filing of a petition in bankruptcy, nor by action of the trustee or debtor-in-possession, remained in effect. When the bankruptcy court ordered the payment of the judgment proceeds into the bankruptcy proceeding, it exercised its summary jurisdiction, but by so doing stepped into the shoes of the state court.

The *Northern Pipeline* case merely acknowledges the existence of summary jurisdiction before the 1978 Bankruptcy Act, and was not confronted with any of the fact situations of the instant case.

THE COURT OF APPEALS' DECISION DOES NOT STAND AS PRECEDENT FOR THE PROPOSITION THAT EVERY EXECUTORY ATTORNEY FEE CONTRACT PREDATING BANKRUPTCY IS NOT REVIEWABLE UNLESS FIRST AFFIRMATIVELY REJECTED

The Court of Appeals' decision is not precedent for the generalized proposition urged by petitioner, to-wit; "That *every* attorney fee contract entered into prior to the commencement of a proceeding is binding upon the Court and is not subject to review unless the fee agreement is first affirmatively rejected" (emphasis added). The Court of

Appeal's decision is limited to its special facts. The Respondent's contingent fee contract was entered into in April 1971, over five years before the filing of the Chapter XI proceedings, and cannot be considered a contract for services in the administration of a bankruptcy estate made in contemplation of the filing of a proceeding in bankruptcy. The bankruptcy court's control over fee contracts for and in the administration of a bankruptcy estate was never in issue in this cause. Petitioner again cites *Carter v. Woods*, supra, and quotes the same passage quoted earlier in its brief. As previously pointed out, that case involved an attorney fee contract made by the trustee *during* administration of the bankruptcy estate.

Petitioner's attorney, Mr. Ancel, asserts that the Court of Appeals was in error in deciding that a contract for attorney fees entered into between a debtor and his counsel prior to the commencement of a Chapter XI proceeding is entitled to treatment generally afforded executory contracts under the Bankruptcy Act and could not tacitly be rejected. It is interesting to note that in the Objections to MALEY's fee application filed by Mr. Ancel's law firm on behalf of his client, Citizen's State Bank, it was stated:

> 4. That the contingent fee arrangement alleged in Robert J. Maley's application is, if anything, an executory contract which may be accepted or rejected in the herein proceedings pursuant to the Bankruptcy Act or rules.

Likewise in the brief filed in support of Citizen's State Bank's objections by Mr. Ancel's law firm, it was stated:

> "rejection or acceptance of an executory contract must be done within the framework of judicial action. The judicial formalities must be complied with."[14]

The holding of the Court of Appeals relative to MALEY'S

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[14]Record, Vol. 1, p. 336

executory fee contract was not in error and cannot be extended beyond its specific import.

THERE WAS NO IMPROPER ABANDONMENT BY THE BANKRUPTCY COURT OF ITS JURISDICTION TO DETERMINE ATTORNEY FEES BY ORDERING THE DEBTOR TO PROCEED WITH PENDING LITIGATION IN STATE COURT THEREBY REQUIRING APPLICATION OF STATE LAW TO THE ATTORNEY'S CONTRACT AND LIEN

Petitioner questions the ability and right of the bankruptcy court to authorize the debtor-in-possession to abandon risky pending state court litigation and to authorize the debtor to proceed with the pending litigation outside and apart from the administration of the estate of the debtor-in-possession in the bankruptcy court. Petitioner attempts to find support for its argument in the decision of *Brown v. Gerdes*, 321 U.S. 178 (1944), but that case involved a Chapter X proceeding where the bankruptcy court authorized the debtor to prosecute an action in state court and to be *substituted as plaintiff*, and also authorized the retention of attorneys to pursue that suit. The bankruptcy court unquestionably retained the duty to pass on the fees of the attorney for the trustees under those circumstances.

Securities and Exchange Commission v. Crumpton Builders, Inc., 337 F.2d 907 (5th Cir. 1964), relied upon by petitioner, is not a precedent which applies to the factual situation in the instant case. Furthermore, Chapter XI proceedings are different in nature than Chapter X proceedings and are by their very nature subject to minimum control by the courts.

This court in the case of *Johnson v. Collier*, 222 U.S. 538 (1912), 56 L. Ed. 306, 32 S. Ct. 104, dealt with the right of a bankrupt to pursue litigation in state court after the filing of a bankruptcy petition. The court said, 222 U.S. at 540:

> If, because of the disproportionate expense, of uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states... if money or property is finally recovered, it will be for the benefit of the estate.

It is stated at 9 American Jurisprudence, Bankruptcy, §877, p. 661, 662:

> The Bankrupt, upon the abandonment of the cause by the trustee, is entitled to continue the pursuit of the action, albeit a recovery in the suit may benefit the estate and not him.

The Court of Appeals recognized the abandonment of the cause of action by the debtor-in-possession as one of the three options available in the bankruptcy court in a situation dealing with pending litigation, which options had been outlined in the case of *Sherman v. Buckley*, 119 F.2d 280 (2d Cir. 1941).[15] Paraphrasing the court's statement, these options, available to the attorneys for the debtor-in-possession, were:

> (a) Discontinue the litigation and dispose of the debtor's chose in action as best they could. In this case the attorney's valid fee contract would have to have been affirmatively rejected and would have had to have been liquidated (on a quantum meruit basis).
>
> (b) The debtor-in-possession could intervene in the state court condemnation action and take over the litigation. Then the debtor-in-possession could have retained the attorney, MALEY, under some mutually agreeable terms of employment or discharged him. Had he been discharged his valid fee contract would again have had to have been liquidated.

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[15]Opinion of Court of Appeals, 671 F.2d at 228, Appendix, pp A-14, 15

(c) It could have left the litigation in status quo by leaving the debtor and its attorney to fight out the litigation at their own expense and then step in to claim the fruits of recovery, encumbered by MALEY's attorney's fee lien.

INNKEEPERS' bankruptcy attorneys chose the third option. The abandonment of the state court condemnation action subjected the whole of the litigation, including the settlement and liquidation of the attorney's lien charge based on MALEY's fee contract, to the jurisdiction of the Indiana courts to be determined under Indiana law. This was the only way the debtor-in-possession could avoid liquidiating MALEY's fee contract before any recovery in the suit was had and known.

THERE IS NO ERROR IN THE COURT OF APPEALS' DECISION AS IT DEALS WITH JURISDICTION OVER THE PROPERTY OF THE DEBTOR-IN-POSSESSION AND THE DISTINCTION BETWEEN DEBTOR-IN-POSSESSION AND DEBTOR, AND THE ABANDONMENT OF PROPERTY TO THE DEBTOR

Petitioner argues that the Court of Appeals held that the bankruptcy court had no authority to review MALEY's fee contract because it determined it was reversible error for the bankruptcy court to have utilized the factors normally considered in determining the reasonableness of attorney fees in bankruptcy proceedings reasoning that MALEY's services were not rendered as a part of the bankruptcy proceedings. Petitioner's counsel is offended by the statement of the Court of Appeals that MALEY never performed any legal services for the *debtor-in-possesion* but considered his legal services as being services for INNKEEPERS in its pre-Chapter XI status and thereafter in its status as *debtor*. From this he reasons that the decision of the Court of Appeals establishes an erroneous precedent for the legal proposition that in a

Chapter XI proceeding the "debtor" is a separate entity from the "debtor-in-possession" who may retain assets and administer them apart from the bankruptcy estate and outside the supervision of the bankruptcy court. Of course, the Court of Appeals' decision is not a precedent for such a proposition. Contrary to petitioner's assertions, the distinction between "debtor" and "debtor-in-possession" is well recognized. It was even recognized in these proceedings when the firm of Teague, Cole & Hamer began appearing in the Chapter XI proceedings in May of 1979, as attorneys for the debtor, without obtaining any authority from the court or filing any affidavit under the Bankruptcy Rules.[16] Furthermore, on January 30, 1981, INNKEEPERS, as *debtor*, petitioned for authority to employ and the court authorized the employment of special counsel Teague to represent the debtor. BAMBERGER & FEIBLEMAN, counsel for the debtor-in-possession, did not participate in the appeal.

The bankruptcy rule applicable to Chapter XI proceedings recognized the distinction between debtor and debtor-in-possession. Bankruptcy Rule 22-31 clearly demonstrates a complete differentiation between the attorney for the debtor and the attorney for the debtor-in-possession.

As to whether or not the debtor retained any interest in its chose of action, the eminent domain action in the state court, this court has held that the trustee in bankruptcy may prosecute any suit which was commenced by the bankrupt prior to the adjudication since he becomes vested by operation of law with the title of the bankrupt as of the date of adjudication. The court went on to hold, however, in *Johnson v. Collier*, supra:

> If, because of the disproportionate expenses, or uncertainty as to the result, the trustee neither sues

[16]Record, Vol. 1, pp. 1-43

> nor intervenes, there is no reason why the bankrupt himself should not continue the litigation.

Of course, as previously pointed out the trustee or a debtor-in-possession may abandon or refuse to pursue a law suit in state court, thereby permitting the debtor to pursue the action apart from the bankruptcy proceedings.

THERE IS NO ERROR IN THE COURT OF APPEAL'S INTERPRETATION OF INDIANA LAW RELATIVE TO ATTORNEY LIENS NOR IN ITS APPLICATION OF §107(C)(1)(B) OF THE BANKRUPTCY ACT

It is not necessary to resort to the doctrine that an attorney's lien on a judgment relates back to the commencement of the action to answer the argument Mr. Ancel advances that MALEY had no lien on the judgment. *Friedman v. Harris*, 158 F.2d 187 (C.A.D.C. 1946). The relationship back of MALEY's attorney's lien and its preference over the mortgages of Alexander Hamilton Life Insurance Company of America, holder of a first mortgage having priority over the mortgage of Mr. Ancel's other client, Citizens State Bank, was generally conceded in the brief filed on behalf of Alexander Hamilton Life Insurance Company in its cross-appeal filed and decided by the Court of Appeals. On page 12 of its brief it observed:

> "No one has questioned the validity or priority of the charging lien;..."

This reflects the general posture of this case from its inception. The Bankruptcy Judge did not find that the charging lien was invalid, but in its order transferred the lien to the proceeds of judgment paid over to the debtor-in-possession under court order and in its Recommendations determined that the validity of the lien was not really an issue since its order required the payment of the amount it allowed as a priority item as an expense of administration. The attorney's lien was created in the state court

proceedings which had been turned over to the debtor. Whether or not MALEY's attorney's lien existed or would have been binding on the bankruptcy court had the debtor-in-possession remained in control of the state court proceedings was never put in issue. Obviously the statutory lien was not the only lien or remedy available to the litigation attorney (MALEY).

An attorney's right to a fee may also be protected where a fund has been created by the attorney's efforts, out of which he is equitably entitled to compensation. *State ex rel. McNabb v. Allen Superior Court No. 2*, (1947) 225 Ind. 402, 75 N.E.2d 788, at 792; *In The Matter of Four Seasons Nursing Centers of America, Inc.* 357 F.Supp. 594 (1947 W.D.Ok. 1973). The early decision of *Miedreich v. Rank*, 40 Ind. App. 393 (1907), recognized that an attorney practicing in Indiana courts may, by virtue of the statute, acquire a lien upon the judgment which he obtains for his client, although such a lien is not his exclusive remedy. Equity will create and enforce a lien in his favor independent of the statute. The court stated, 40 Ind. App. 393 at 398:

> The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected.

The equitable lien had priority over any lien created on the land from which the fund resulted after the attorney acquired or attempted to acquire a statutory lien. *Justice v. Justice*, 115 Ind. 201 (1888).

Mr. Ancel's principal argument is based upon a section of the Bankruptcy Act, quoted in his petition, which itemizes certain liens which shall be invalid against the trustee including a statutory lien not perfected at the date of bankruptcy. 11 U.S.C.A. §107(c)(1)(B). Mr. Ancel fails to quote the last part of the enactment which states in part as follows: "(5) This subdivision shall not apply to liens...against property abandoned by the trustee or

unadministered in bankruptcy for any reason and shall not apply to proceedings under §205 of this title, nor proceedings under Chapter 10 of this title unless an order has been entered directing that bankruptcy be proceeded with." 11 U.S.C.A. §107(c)(5).

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS AND DECISIONS IN OTHER CIRCUITS ON THE ISSUE OF JURISDICTION CONFERRED ON BANKRUPTCY COURTS TO FIX THE COMPENSATION OF COUNSEL IN SIMILAR FACTUAL SITUATIONS

Mr. Ancel, in seeking conflict among decisions of the Circuit Courts of Appeal, asserts that the 8th, 9th and 10th Circuits have generally held, in factual situations similar to the instant case, that the jurisdiction conferred on bankruptcy courts to fix the compensation of counsel is paramount and exclusive. He cites *In re Pacific Far East Line, Inc.*, 654 F. 2d 664 (9th Cir. 1981), which rests upon a different factual situation wherein the court allowed slightly less than the exact recovery called for in a pre-bankruptcy contract, and the litigation attorney had been appointed special counsel for the debtor-in-possession by the court to handle the proceedings. The court did hold, however, that both the bankruptcy court and the district court were in error when they determined the fee ($1,500,000.00) under federal bankruptcy standards as a reasonable fee and stated 654 F 2d at 670:

> But federal standards are not directly applicable; the lien was created by state law, and thus state law standards apply to its measure. *In re Diplomat Electric, Inc.*, 499 F.2d 342, 348-49 (5th Cir. 1974).

Since the attorney had not appealed the sufficiency of the fee the Court did not question its adequacy under the state law. The decision of *Sanders v. Providence Washington*

Insurance Co., 442 F.2d 461 (8th Cir. 1971) cited by petitioner is readily distinguishable in that it arose out of the proceeding to enforce an attorney's lien where the plaintiff was declared bankrupt in an involuntary proceeding instituted almost simultaneously with the damage action. The trustee in bankruptcy was substituted for the plaintiff in the lawsuit and the petition to employ the original counsel as special counsel was rejected by the referee in bankruptcy. Later, the bankruptcy court authorized the trustee to settle the lawsuit in federal court and the original litigation attorney filed his motion claiming compensation under his contingent fee contract. The case is authority only for the proposition that the discharged attorney must prosecute his claim for services as a pre-bankruptcy creditor of the bankrupt. It was simply an appeal from an order fixing attorney fees for the trustee's attorney who has engaged in litigation during the proceedings in bankruptcy, and the case involves only the application of bankruptcy standards of reasonableness to fees during administration. The case of *Official Creditors' Committee of Fox Markets Inc. v. Ely*, 337 F.2d 461 (9th Cir. 1975), dealt with a contract of employment by the trustee in a Chapter X proceeding and attorney for fees based upon a contingency basis. The case is authority only for the proposition that contingent fee contracts between a trustee and an attorney were invalid. Petitioner then cites *Jackson v. Vance*, 554 F. 2d 154 (10th Cir. 1949). In that case certain damage actions were instituted in state court and thereafter, within two or three days, the plaintiff was adjudged a bankrupt. The trustee employed attorneys of his own choice and was substituted as party plaintiff in the state court action. The case is authority for the proposition that the existing rights of the replaced attorneys for services were not extinguished but became claims to be determined in the bankruptcy proceedings.

The petitioner further seeks to find conflict between the instant decision and that in the case of *In re Land Investors*,

554 F.2d 925 (7th Cir. 1976). There the attorneys in the pre-bankruptcy litigation had agreed to a contingent fee basis, but the precise amount was not set forth. The court found that under those conditions the bankruptcy court had no real alternative but to determine a reasonable contingent fee and stated, 554 F.2d, at 932:

> We need not consider whether the state courts of Wisconsin may have had jurisdiction to determine and enforce appellant's lien because those courts did not purport to do so.

Upon examination, therefore, the cases cited by petitioner are not precedent for the proposition of law he asserts. Respondent contends, of course, that the Court of Appeals' decision in the instant case in no way challenges or threatens federal court jurisdiction to determine fees, for not only are the facts in the instant case special and unique, but the court's decision actually acknowledges that the bankruptcy court had assumed jurisdiction of the matter and therefore remanded the matter to the federal court for further proceedings. It did not strip the court of the jurisdiction it had assumed and send the matter to the state court for determination.

THE FACTUAL SITUATION IS UNIQUE AND NOT LIKELY TO RECUR

The debtor-in-possession and by inference the court and secured and unsecured creditors, chose the option to maintain the status quo in the condemnation case. The decision makes it clear from its analysis of the findings of the Bankruptcy Judge, that this course of action was taken for the reason that no one, including the debtor-in-possession or its bankruptcy counsel, the bankruptcy court or any of the creditors, had any hope that the litigation would have a successful result and carefully chose not to embroil the debtor-in-possession's estate in hopeless litigation with additional costs and expenses including attorneys' fees on an apparently hopeless pursuit.

It is the examination of the second option outlined by the Court of Appeals that makes this factual situation one that is unlikely to recur. Prior to the Bankruptcy Act of 1978 there was much doubt concerning the employment of attorneys for trustees (or debtors-in-possession) to pursue actions in state court under contingent fee arrangements. The cases are replete with situations where attorneys representing clients in litigation still pending at the time of bankruptcy proceedings had rejected the trustee's offer of employment on a noncontingent fee basis and had recovered their fee on a quantum meruit basis at that point. There is some authority for recovery of an amount measured by the prior contingent fee arrangement. It is fair to assume that the debtor-in-possession here did not believe the attorney could be employed under a contingent fee arrangement to continue the litigation and did not wish to burden the estate with fees should he elect to continue the litigation on a per diem basis if approved by the court; therefore, the debtor-in-possession elected the third option. Since the 1978 amendments to the Bankruptcy Act it is now clearly possible for the court to approve employment of counsel under a contingent fee basis. Presumably litigation counsel who have agreed to pursue *apparently* unrewarding litigation under a contingency fee contract would be willing to continue the same arrangement, if offered. In the instant case the debtor-in-possession and its counsel simply chose in effect to abandon all responsibility for the state court action knowing that its right to collect the proceeds once payable to the debtor would be undisturbed.

THIS CASE IS OF RELEVANCE AND IMPORTANCE ONLY TO THE LITIGANTS

This case is of importance only to the litigants. This is not a bankruptcy but rather a Chapter XI arrangement proceeding. The debtor-in-possession has never been insolvent. The funds which would have been available after payment of MALEY's fee under his contract plus the funds

expected from the sale of the Holiday Inn and the real estate, were more than sufficient to discharge all of the obligations of Innkeepers with a surplus payable to the stockholders. The principal stockholders of Innkeepers of New Castle, Inc., Andrew and Lucille Tabor, had engaged BAMBERGER & FEIBLEMAN to file proceedings under Chapter XII of the Bankruptcy Act which are pending in the same court. The plan proposed by BAMBERGER & FEIBLEMAN, as attorneys for INNKEEPERS in its Chapter XI proceeding, called for the surplus funds to spill over into Chapter XII proceedings where the assets were otherwise insufficient to pay creditors. Citizens State Bank is likewise a creditor in the Chapter XII proceedings. Citizens, although it had the status of a secured creditor of INNKEEPERS, became a prime opponent of MALEY's application for payment of his fee and lien throughout the Chapter XI proceedings, Mr. Ancel and his law firm participating in the evidentiary hearing and submitting extensive briefs and arguments on its behalf. Citizens may well fear that even if the pour-over plan is adopted in Innkeepers' Chapter XI proceedings the total funds available to pay Citizens may be eroded with the passage of time and a declining economy and ever-increasing administrative expenses. It was to the particular interest of Citizens State Bank that MALEY's lien on the eminent domain judgment proceeds be reduced, thereby creating greater surplus out of which its claims could be paid.

It is interesting to note that INNKEEPERS either as debtor-in-possession or debtor offered no opposition to MALEY's petition for payment of fees. The only opposition in the Bankruptcy Court hearings came from Citizens State Bank and Alexander Hamilton, secured creditors. It was only after the Bankruptcy Court reduced the payment to MALEY that INNKEEPERS employed a special counsel to appear in the Seventh Circuit proceedings and another special counsel, Mr. Ancel, in these proceedings. Mr. Ancel is, incidentally, the same attorney who has

appeared of record for Citizens State Bank throughout all of the proceedings. Respondent suggests that the dual representation of the attorney for Citizens State Bank and the petitioner herein may account for the extreme inventiveness and far-reaching aspects of his arguments for granting the writ of certiorari. Citizens State Bank can be categorized as a litigant although it did not join in the appeal decided by the Seventh Circuit Court of Appeals. It is of prime interest to Citizens State Bank that MALEY's fee be reduced because of its position as a partially secured creditor, and its counsel is thereby motivated.

CONCLUSION

Respondent respectfully submits that it is the stated policy of this Court to pass on only those issues which are properly presented within the case. Respondent concludes that Petitioner's numerous arguments seeking a matter to attract this Court's attention, resulting from Petitioner's counsel's strong motivations to reverse the court below, has caused him to lose sight of the distinction between the actual holding of a decision and mere principles of law recited in the opinion. These matters to which Petitioner's brief is addressed are not, in fact, the *precedent* it seeks to have reviewed. Precedent is, after all, a closely defined principle.

Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

Robert J. Maley
Harrington, Maley, Gardner
& Sayre
Third Floor, Peoples Building
Richmond, Indiana 47374
317/966-6643

Respondent Robert J. Maley